THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

RE

346.4
Mx. North Gall.

University of London

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—Sir Thomas R. Hughes, K.C.

Vice-Chairman—Sir William Hansell, K.C.

EX-OFFICIO MEMBERS.

Right Hon. Sir T. W. H. Inskip, M.P. . Attorney-General.

Sir F. B. Merriman, M.P. . . . Solicitor-General.

C. E. Barry, Esq., President of the Law Society.

ELECTED MEMBERS.

Sir Herbert Cunliffe, K.C. Alfred Adams, Esq.	Lincoln's Inn.
F. P. M. Schiller, Esq., K.C. Meyrick J. L. Beebee, Esq.	Inner Temple.
Joshua Scholefield, Esq., K.C. W. E. Vernon, Esq.	Middle Temple.
Edward Clayton, Esq., K.C. Sir W. Greaves-Lord, K.C., M.P.	Gray's Inn.
Sir Thomas R. Hughes, K.C., of Lincoln's Inn. Sir William Hansell, K.C., of the Inner Temple.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
G. Stanley Pott, Esq. (Firm—Messrs. Holmes, Son & Pott). George Dudley Colclough, Esq. (Firm—Messrs. Johnson, Jecks & Colclough).	The Law Society.

Secretary—P. Noble Fawcett, Esq.

Assistant-Secretary—T. M. Chitty Thomas, Esq.

30, Montague Street, London, W.C. 1.

1933.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Probate Division.

COURTS OF PROBATE, DIVORCE, AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL:

ALSO DECISIONS IN THE

ECCLESIASTICAL COURTS.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

REPORTERS.

Court of Appeal . .	W. IVIMEY COOK, H. C. GARSIA,	*Barristers-at-Law.*
Probate and Divorce .	R. M. MIDDLETON,	*Barrister-at-Law.*
Admiralty Cases . .	E. C. M. TREHERN,	*Barrister-at-Law.*
Ecclesiastical Cases .	W. L. L. BELL,	*Barrister-at-Law.*

1933.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET,
LONDON, W.C. 1,
AND
PRINTED BY W. SPEAIGHT & SONS, LTD., 98–99, FETTER LANE, LONDON, E.C. 4.

BIBL.
LONDIN.
UNIV.

JUDGES

OF

THE COURT OF APPEAL.

1933.

Viscount SANKEY, Lord Chancellor.
Lord HEWART, Lord Chief Justice of England.
Lord HANWORTH, Master of the Rolls.

Lord MERRIVALE,	President of the Probate, Divorce, and Admiralty Division.
Sir T. E. SCRUTTON, Sir P. O. LAWRENCE, Sir F. A. GREER, Sir HENRY SLESSER, Sir M. L. ROMER,	Lords Justices of the Court of Appeal.

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-family-division_1933

JUDGES

OF THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

1933.

Lord Merrivale, President.
Sir A. D. Bateson.
Sir G. P. Langton.

ERRATA.

Page	*Lines*	
97	24 and 25	*T. J. O'Connor K.C.* and the *Hon. Victor Russell* appeared for the petitioner and *W. O. Willis K.C.* and *H. W. Barnard* for the respondent.
105	4 and 5	*Withers & Co.* were solicitors for the wife and *Halsey, Lightly & Hemsley* for the husband.
230	Footnote (2) should be L. R. 6 C. P. 563.	
232	10	*for* 'dicta' *read* 'dictum.'

The Mode of Citation of the Volumes of the *Law Reports* commencing January 2, 1933, will be as follows:—

In the First Series,
[1933] Ch.

In the Second Series,
[1933] 1 K. B. [1933] 2 K. B. [1933] P.

In the Third Series,
[1933] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

B.

PAGE

Baarn, The (C. A.) 251
Barlow (H. T.) (Deceased) 184
Bathori, The 22
Beaumont *v.* Beaumont (C. A.) 39
Bryce *v.* Bryce 83

C.

Colclough *v.* Colclough and Fisher 143
Cullen *v.* Cullen (C. A.) 218
Cuthbertson, Ex parte. In re Little Gaddesden Churchyard 150

D.

Donkin *v.* Donkin 17

H.

H. M. Submarine Rainbow 68
Horniman *v.* Horniman 95
Humorous, The 109
Hyde *v.* White 105
——— White *v.* 105

I.

PAGE

Intract *v.* Intract otherwise Jacobs 190

K.

Kaituna, The (C. A.) 234
Kite, The 154

L.

Lady Belle, The 275
Lalandia, The 56
Little Gaddesden Churchyard, In re. Ex parte Cuthbertson 150

M.

Mabel Vera, The 109
Mason *v.* Mason (Cottrell cited) (C. A.) 199
——— *v.* Mason and Cottrell (Trist Intervening) (C. A.) 199
Minerva, The 224
Mould *v.* Mould 76

N.

	PAGE
Napier Star, The	136
Natborny *v.* Natborny (C. A.)	1
Newte *v.* Newte and Keen	117

R.

Rainbow, H.M. Submarine	68
Rehearo, The	286

S.

	PAGE
St. Joseph, The	119

W.

White *v.* Hyde	105
—— Hyde *v.*	105

Z.

Zigurds, The (C. A.)	87

TABLE OF CASES CITED.

A.

		PAGE
Acteon, The	2 Dods. 48	24
Albano, The, and The Parisian	[1907] A. C. 193	278
Aleson *v.* Aleson	2 Lee, 576	191
Allison *v.* Independent Press Cable Association of Australasia	28 Times L. R. 128	57
Alston *v.* Alston	[1929] P. 311	145
Annie Johnson, The	[1918] P. 154	123
Anonymous	Dea. & Sw. 295	192
———	76 Sol. Journ. 893	219
Arkwright *v.* Arkwright	73 L. T. 287	118
Armour & Co. *v.* Charles Tarbard, Ld.	37 Times L. R. 208	160
Armstrong & Co. *v.* M'Gregor & Co.	2 R. 339	111
Austin Friars Steam Shipping Company *v.* Strack	[1905] 2 K. B. 315	25
Ava, The	2 Asp. M. L. C. 182	237

B.

B. *v.* C.	32 L. J. (P. & M.) 135	192
B. *v.* L.	L. R. 1 P. & M. 639	193
Ballard *v.* North British Railway Company	1923 S. C. (H. L.) 43	154
Barratt *v.* Great Northern Railway Company	20 Times L. R. 175	159
Beevor *v.* Beevor	3 Ph. Ecc. 261	42
Bell *v.* Kennedy	L. R. 1 H. L. Sc. 307	84
Benyon *v.* Benyon	15 P. D. 29	117
Beryl, The	9 P. D. 137	237
Betton-Bright *v.* Betton-Bright	[1920] P. 338	211
Blonde, The	[1922] 1 A. C. 313	24
Bold Buccleugh, The	7 Moo. P. C. 267	231
Born, In re	[1900] 2 Ch. 433	209
Bourgogne, La	[1899] P. 1; [1899] A. C. 431	57
Bragg *v.* Bragg	[1925] P. 20	6
Brandt *v.* Liverpool, Brazil and River Plate Steam Navigation Company	[1924] 1 K. B. 575	123
Brandt's (William) Sons & Co. *v.* Dunlop Rubber Company	[1905] A. C. 454	88, 89
Briggs *v.* Morgan	2 Hag. Con. 324	192
British-American Continental Bank, Ld. (Crédit Général Liégeois' claim)	[1922] 2 Ch. 589	259
Brodie *v.* Brodie	2 Sw. & Tr. 259	84
Brown *v.* Feeney	[1906] 1 K. B. 563	42
Brydges *v.* Brydges	[1909] P. 187	43

C.

Cadeby, The	[1909] P. 257	277
Cheale *v.* Cheale	1 Hag. Ecc. 374	44
Chr. Knudsen, The	[1932] P. 153	225
Christiansborg, The	10 P. D. 141	259

		PAGE
Clara Killam, The	L. R. 3 A. & E. 161	225
Cleopatra, The	Swa. 135	237
Coleman *v.* Coleman	[1920] P. 71	39
——— *v.* ———	L. R. 1 P. & M. 81	220
Coltman *v.* Chamberlain	25 Q. B. D. 328	111
Consett, The	5 P. D. 77	255
Constantinidi *v.* Constantinidi and Lance	[1903] P. 246	221
Constitution, The	2 Moo. P. C. (N. S.) 453	237
Cooke *v.* Cooke	2 Phill. Ecc. 40	98
Cope *v.* Cope	(1864) Unreported	100*n*.
Crédit Foncier d'Algerie et de Tunisie *v.* Simpson, Spence & Young	42 Ll. L. R. 32	89
Creterope *v.* N. E. Railway Company	8 Ll. L. Rep. 320; 9 Ll. L. Rep. 450	288, 297
Crispin, The	34 Ll. L. R. 400; 35 Ll. L. R. 197	137
Crookenden *v.* Fuller	1 Sw. & Tr. 441	86
Crown Steamship Company *v.* Eastern Navigation Company	1918 S. C. 303	237
Cumber *v.* Wane	1 Stra. 426	261
Cunningham *v.* Cunningham	77 L. T. 405	39
Currie *v.* M'Knight	[1897] A. C. 97	226

D.

Dean *v.* Dean	[1923] P. 172	98
Debtor, a, In re	[1929] 2 Ch. 146	202
Delta, The	1 P. D. 393	259
D'Etchegoyen *v.* D'Etchegoyen	13 P. D. 132	84
Dering *v.* Dering	L. R. 1 P. & M. 531	44
Dinorwic, The	32 Ll. L. Rep. 295	278
Dundee, The	1 Hagg. Adm. 109	111
———, The	2 Hagg. 137	137
Dutch *v.* Dutch	92 J. P. 197	6

E.

E. *v.* E. (otherwise T.)	[1903] P. 88	142
Earl of Elgin, The, and The Jesmond	1 Asp. M. L. C. 150	237
Earle's Shipbuilding and Engineering Company *v.* Aktieselskabet D/S Gefion	10 Ll. L. Rep. 305	288
East and West India Dock Company, In re	38 Ch. D. 576	186
Egyptian, The	[1910] P. 38; [1910] A. C. 400	288
Elder, Dempster & Co. *v.* Paterson, Zochonis & Co.	[1924] A. C. 522	157
Embiricos *v.* Anglo-Austrian Bank	[1905] 1 K. B. 677	260
Evans *v.* Evans	1 Sw. & Tr. 328	206

F.

Faithfull *v.* Ewen	7 Ch. D. 495	106
Fama, The	5 C. Rob. 106	36
Fisher *v.* Fisher	2 Sw. & Tr. 410	99
Fowler *v.* Fowler	(1932) In Chambers, Unreported	78

G.

		PAGE
Gale *v.* Laurie	5 B. & C. 156	111
Gazelle, The	2 W. Rob. 279	137
Gilbey *v.* Gilbey	[1927] P. 197	101
Gladstone *v.* Gladstone	1 P. D. 442	117
Good *v.* London Steamship Owners' Association	L. R. 6 C. P. 563	225
Gripaios *v.* Kahl Wallis & Co.	45 Times L. R. 161	287
Groedel *v.* Administrator of Hungarian Property	44 Times L. R. 65	24
Guatemala (Republica) *v.* Nunez	[1927] 1 K. B. 669	260
Gundry *v.* Sainsbury	[1910] 1 K. B. 645	202

H.

H. *v.* C.	29 L. J. (P. & M.) 81; 1 Sw. & Tr. 605	191
Hall *v.* Hall	[1891] P. 302	202
—— *v.* ——	3 Sw. & Tr. 390	39
—— *v.* N. E. Railway Company	L. R. 10 Q. B. 437	159
Hambleton *v.* Brown	[1917] 2 K. B. 93	202
Harris *v.* Ball	Unreported	192
Harrison *v.* Harrison	4 Moore P. C. 96	191*n.*
———— *v.* Sparrow	3 Curteis, 1	192
Hartopp *v.* Hartopp	[1899] P. 65	145
Harvest, The	11 P. D. 14	70
Hatchmere, The	22 Ll. L. Rep. 153	278
Hayn *v.* Culliford	3 C. P. D. 410	225
Heap *v.* Jackson	(1886) W. N. 192	106
Hebe, The	2 W. Rob. 530	137
Heinrich Björn, The	11 App. Cas. 270	232
Henderson *v.* Henderson	3 Hare, 100	78
Hodgson *v.* De Beauchesne	12 Moo. P. C. 285	84
———— Roberts *v.* Hodgson Roberts	[1906] P. 142	145
Holt *v.* Holt	28 L. J. (P. & M.) 12	206
Horniman *v.* Horniman		95
Hull Ropes Company *v.* Adams	65 L. J. (Q. B.) 114	111

I.

Industrie, The	L. R. 3 A. & E. 303	227

J.

Jesmond, The, and The Earl of Elgin	1 Asp. M. L. C. 150	237
Jinks *v.* Jinks	[1911] P. 120	208
Joannis Vatis, The (No. 2)	[1922] P. 213	139
Johnson *v.* Johnson	[1900] P. 19	4

K.

Kaiser Wilhelm der Grosse, The	[1907] P. 36	70
Keats *v.* Keats and Montezuma	1 Sw. & Tr. 334	206
Keet *v.* Smith	1 P. D. 73	151

		PAGE
Kemp-Welch *v.* Kemp-Welch and Crymes	[1910] P. 233	208
Knight *v.* Gardner	[1892] 2 Ch. 368	106
Kong Magnus, The	[1891] P. 223	139
Kronprinsessan Margareta, The	[1921] 1 A. C. 486	123

L.

La Bourgogne	[1899] P. 1; [1899] A. C. 431	57
Langham *v.* Governors of Wellingborough School and Fryer	101 L. J. (K. B.) 513	159
Linkmoor, The	35 Ll. L. Rep. 225	278
London, Chatham and Dover Railway Company *v.* South Eastern Railway Company	[1893] A. C. 429	137
Lynch Bros., Ld. *v.* Edwards and Fase	37 Times L. R. 432	160

M.

M. *v.* M. and A.	26 Times L. R. 305	46
M'Evoy *v.* The Sneyd	29 Ir. Law Times 317	226
McHenry *v.* Lewis	22 Ch. D. 397	259
Maconochie *v.* Maconochie	[1916] P. 326	39
Margetts and Ocean Accident and Guarantee Corporation, In re	[1901] 2 K. B. 792	225
Marlborough (Duchess of) *v.* Marlborough (Duke of)	[1901] 1 Ch. 165	146
Maudslay, Sons & Field, In re	[1900] 1 Ch. 602	260
Mellars *v.* Mellars	95 J. P. 169	5
Mercer *v.* Graves	L. R. 7 Q. B. 499	205
Mersey Shipping and Transport Company *v.* Rea, Ld.	21 Ll. L. Rep. 375	158
Meter Cabs, Ld., In re	[1911] 2 Ch. 557	209
Mona, The	[1894] P. 265	261
Mordaunt *v.* Moncreiffe	L. R. 2 H. L. Sc. 374	191
Morgan *v.* Morgan	L. R. 1 P. & M. 644	220
Muirhead, Ex parte	2 Ch. D. 22	215
Munro *v.* Munro	7 Cl. & Fin. 842	84

N.

Nairne *v.* Nairne	18 Times L. R. 16	208
Newall *v.* Royal Exchange Shipping Company	33 W. R. 342, 868	287
Nichols, The	7 Wall. 656	237
Northumbria, The	L. R. 3 A. & E. 6	139
Norton *v.* Seton	3 Phill. Ecc. 147	192
Nutter (Walter) & Co. *v.* Messageries Maritimes de France	54 L. J. (Q. B.) 527	57

O.

Okura & Co. *v.* Forsbacka Jernverks A/B	[1914] 1 K. B. 715	56
Ormerod *v.* Tate	1 East, 464	209
Orduna, The	[1921] 1 A. C. 250	237
Otranto, The	[1931] A. C. 194	237, 278
Ottaway *v.* Hamilton	3 C. P. D. 393	208
Otway *v.* Otway	2 Phill. Ecc. 109	98

P.

		PAGE
Palmer *v.* Palmer	[1914] P. 116	199
Paludina, The	[1925] P. 40	158
Peyrae *v.* Wilkinson	[1924] 2 K. B. 166	259
Phœnix, The	1 Spink, 306	31
Pollard *v.* Wybourn	1 Hag. Ecc. 725	192
Powell *v.* M'Glynn & Bradlaw	[1902] 2 Ir. R. 154	159
Princesse Clémentine, The	[1897] P. 18	63
Prinsep *v.* Prinsep	[1929] P. 225	147
Puddephatt *v.* Leith (No. 2)	[1916] 2 Ch. 168	202

R.

Ranza, The	79 L. J. (P.) 21	278
Rawson *v.* Haigh	2 Bing. 99	84
Republica de Guatemala *v.* Nunez	[1927] 1 K. B. 669	260
Restall *v.* Restall	[1930] P. 189	76, 101
Rex *v.* Copestake	[1927] 1 K. B. 468	6
Rhodes *v.* Sugden. In re Wadsworth	[1899] 2 Q. B. 167	106
Robertson *v.* Robertson	6 P. D. 119	206
Rosalind, The	37 Times L. R. 116	137
Rothschild *v.* Administrator of Austrian Property	[1923] 2 Ch. 542	24
Roundell *v.* Currer	6 Ves. 250	54

S.

Saccharin Corporation *v.* Chemische Fabrik von Heyden A/G	[1911] 2 K. B. 516	61
Salmon and Woods, In re	2 Morr. 137	111
Sara, The	14 App. Cas. 209	233
Scott *v.* London and St. Katherine Docks Company	3 H. & C. 596	169
—— *v.* Scott	[1921] P. 107	79
Seacombe, The	[1912] P. 21	275
Sephton *v.* Sephton	58 L. T. 281	6
Serrell *v.* Serrell	2 Sw. & Tr. 422	192
Shipwright *v.* Clements	63 L. T. 160	141
Sidney *v.* Sidney	4 Sw. & Tr. 178; 36 L. J. (P. & M.) 73	99
Smith *v.* Smith	7 P. D. 84	211
Société des Hôtels Le Touquet Paris-Plage *v.* Cummings	[1922] 1 K. B. 451	252
Stibbe *v.* Stibbe	[1931] P. 105	101
Sullivan *v.* Sullivan	[1912] 2 I. R. 116	209
Swire, In re	30 Ch. D. 239	137

T.

T. *v.* M.	L. R. 1 P. & M. 31	193
Taylor *v.* Taylor	161 L. T. Jo. 236	118
Thames and Mersey Insurance Company *v.* Società di Navigazione a Vapore del Lloyd Austriaco	12 Asp. M. L. C. 491	56
Theta, The	[1894] P. 280	226
Tickner *v.* Tickner	[1924] P. 118; 40 Times L. R. 367	221

		PAGE
Torni, The	[1932] P. 27	119
Travers & Sons, Ld. *v.* Cooper	[1915] 1 K. B. 73	288
Troija, The	1 Spink, 342	31
Tweed, Ex parte	[1899] 2 Q. B. 167	106

U.

United States *v.* Hayward	2 Gall. 485	36
———— *v.* Rice	4 Wheat. 246	36

V.

Vera Cruz, The (No. 2)	9 P. D. 96; 10 App. Cas. 59	226
Volturno, The	[1921] 2 A. C. 544	251

W.

Waalstroom, The	17 Ll. L. Rep. 53	158
Wadsworth, In re. Rhodes *v.* Sugden	29 Ch. D. 517	106
Wakelin *v.* London and South Western Railway Company	12 App. Cas. 41	159
Waller *v.* Waller	[1927] P. 154	2
Walter Nutter & Co. *v.* Messageries Maritimes de France	54 L. J. (Q. B.) 527	57
Warkworth, The	9 P. D. 145	225
W. A. Sholten, The	13 P. D. 8	57
Welde *v.* Welde	2 Lee, 580	191
Westrup *v.* Great Yarmouth Steam Carrying Company	43 Ch. D. 241	232, 233
Whitton *v.* Whitton	[1901] P. 348	144
Willoughby, Ex parte	16 Ch. D. 604	288
Winkfield, The	[1902] P. 42	158
Winstone *v.* Winstone	2 Sw. & Tr. 246	79
Wood *v.* Wood	[1891] P. 272	101
Wright *v.* Mitchell	18 Ves. 293	49

Z.

Zeta, The	[1893] A. C. 468	228

CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

NATBORNY *v.* NATBORNY.

1932
April 7.
C. A.
June 24.

Divorce—Order for Separation and Maintenance of Wife—Discharge on Ground of her Adultery—Fresh Evidence—Limitation of Time for Application for Discharge—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 7, 8—*Summary Jurisdiction Act,* 1848 (11 *&* 12 *Vict. c.* 43), *ss.* 1, 11.

By s. 7 of the Summary Jurisdiction (Married Women) Act, 1895: "A court . . . . may, on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, alter, vary, or discharge any such order. . . . . If any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged."

By s. 8: "All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts."

By s. 1 of the Summary Jurisdiction Act, 1848, justices might issue summonses (inter alia) "In all cases where a complaint shall be made

C. A.
1932

NATBORNY
v.
NATBORNY.

. . . . upon which . . . . they have . . . . authority by law to make any order for the payment of money or otherwise."

By s. 11: "In all cases where no time is already or shall hereafter be specially limited for making any such complaint . . . . such complaint shall be made . . . . within six calendar months from the time when the matter of such complaint . . . . arose."

In October, 1924, a husband was ordered by a Court of summary jurisdiction to pay his wife 30*s.* a week on the ground of desertion, which amount was in June, 1930, ordered to be reduced to 1*l.* a week. In April, 1931, the husband petitioned for divorce on the ground of his wife's adultery in 1928, and in November, 1931, he was granted a decree nisi, which was made absolute in May, 1932. In December, 1931, the husband took out a summons under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, for the discharge of the order of 1924 on the ground of fresh evidence—namely, the wife's adultery in 1928. At the hearing of that summons in January, 1932, the magistrate refused to make an order discharging the maintenance order on the ground that the husband's complaint was based on a cause of action arising more than six months before the issue of the summons:—

Held (reversing the decision of the Divisional Court), that the words "at any time" in the first part of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, were applicable to both limbs of the section and brought the case within the excepting words of s. 11 of the Summary Jurisdiction Act, 1848, so as to render the six months' limit imposed by that section inapplicable to applications under s. 7 of the Act of 1895.

Waller v. *Waller* [1927] P. 154 overruled.

APPEAL to a Divisional Court (Lord Merrivale P. and Bateson J.) of the husband from the refusal of a Court of summary jurisdiction to discharge a maintenance order on the ground of the adultery of the respondent wife.

The wife was granted a maintenance order at the rate of 30*s.* per week on October 13, 1924, on the ground of desertion by the appellant. In June, 1930, by a further order the amount was reduced to 1*l.* per week. In April, 1931, the husband filed a petition in this Court for dissolution of his marriage on the ground of the adultery of the wife committed since the date of the order, and on December 5, 1931, he obtained a decree nisi. On December 17, 1931, the husband took out a summons for the discharge of the maintenance order, alleging the adultery of the wife in 1928. At the hearing of the summons it was suggested that the husband knew of the adultery as early as 1928. The magistrate before whom the summons came found in the following terms: "In this

C. A.
1932

NATBORNY
v.
NATBORNY.

case the act of adultery relied on was committed four years after the order for maintenance. The second part of the Summary Jurisdiction (Married Women) Act, 1895, s. 7, applies, and the husband neglected to apply within the time. There is no peremptory provision for the discharge of the order under the first part of s. 7, and I doubt whether I have the power to discharge it in the present case. Having regard to all the circumstances I cannot exercise my discretion in this case. Summons dismissed."

The husband appealed from this decision on the grounds that it was wrong in law, that the first part of s. 7 applied, and that there was fresh evidence within the meaning of the section on which the magistrate could discharge the order and that he should have discharged it on the ground of the adultery committed since the date of the order; that he was wrong in holding that the summons was out of time, and that on the evidence he should have exercised his discretion in favour of the appellant.

Maurice Lush for the appellant. The magistrate followed *Waller* v. *Waller*. (1) That case proceeded upon the six months' limit imposed upon complainants under the Summary Jurisdiction Act, 1848, s. 11. The appellant, however, produced at the hearing of the summons the decree nisi which he had obtained. The production of the decree was "fresh evidence" within the meaning of the first part of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, and on that fresh evidence the appellant was entitled to the exercise in his favour of the discretion given by the first part of the section to discharge the order.

[LORD MERRIVALE P. Why should the operation of the second part of the section be avoided? The appellant is out of time under the operation of the second part, as this Court has already decided in *Waller* v. *Waller*. (1)]

The appellant is entitled to apply alternatively either under the first part, which gives the Court an unlimited discretion to be exercised at any time on fresh evidence, or

---

1) [1927] P. 154.

under the peremptory provision in the second part. The six months' limit only applies if he proceeds under the second part. As to what is "fresh evidence" I rely on *Johnson* v. *Johnson.* (1) The magistrate could have proceeded under the first part of the section.

[LORD MERRIVALE P. Your case is that, however long the order may have been in existence, if the husband discovers certain facts he is in a position to say that the order ought neither to have been made nor to continue to operate.]

Noel Middleton for the respondent. This is an attempt to reverse the decision in *Waller* v. *Waller.* (2) There the original order was made in 1912, and in 1926 justices discharged it on the ground of the adultery of the wife in 1915. The present point is thus dealt with (3): "In my judgment the order which they (the justices) made, discharging the order of 1912, is included within the terms of s. 1 of the Act of 1848. It is not an order for the payment of money, but it is an order otherwise than for the payment of money. It is an order to discharge from the payment of money. It is a complaint on which the justices had jurisdiction to find the accused person, so far as that jurisdiction extends, guilty of adultery. In my judgment, therefore, when the justices dealt in September last with a complaint that the wife, the now appellant, had been guilty of adultery in 1915 and proceeded thereupon to make an order for the discharge of a previous order, that was a proceeding which was outside the jurisdiction of the justices by reason that, within the meaning of s. 11 of the Act of 1848, the matter of such complaint arose at the time when the alleged act of adultery was committed—namely, in 1915." And further on in the report (4) there is this passage: "What follows, according to my view of the matter, from what I have said, is that when the justices in September of last year made an order finding the now appellant, the wife, guilty of adultery in 1915 upon a complaint made in August of last year, they were outside their jurisdiction. My view is that the justices

(1) [1900] P. 19.
(2) [1927] P. 154.
(3) [1927] P. 154, 159.
(4) Ibid. 160.

have power to discharge an order for payment of money to a wife, if complaint of an act of adultery of the wife is brought within six months of the time when it has been committed." *Mellars* v. *Mellars* (1) refers to and follows *Waller* v. *Waller*. (2) The Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), s. 30, sub-s. 3, merely repeats the effect of s. 7 of the Act of 1895 so far as concerns the present point.

LORD MERRIVALE P. This case raises a question often under the consideration of the Court. It may be concisely put in this way. What is the joint effect of two enactments: the Summary Jurisdiction (Married Women) Act, 1895, s. 7, with regard to proving adultery on an application to rescind a maintenance order, and the Summary Jurisdiction Act, 1848, s. 11, which governs proceedings in summary jurisdiction generally? The first part of s. 7 of the Act of 1895 is very comprehensive: it deals with provisions by husbands for wives, and there may arise an infinite variety of circumstances calling for reviews of orders for those provisions, and the Court is empowered to vary or discharge them. It is a general power to review, and may be invoked at any time. The second part of the section directs that if a married woman is guilty of adultery the existing order shall be discharged, and the substantial question arising is how far this part of the section is governed by the Summary Jurisdiction Act of 1848, s. 11, which deals with proceedings founded on a complaint on which justices have power to order payment of money "or otherwise," and that Act limits the time for making the complaint to six months.

The decisive question here, as it was thought to be in *Waller* v. *Waller* (2), is whether there is an information with respect to a complaint which ought to be made within six months. In my judgment there clearly is. The appellant complains of the adultery of the respondent. He seeks a new trial in effect of the issue, on which an order was made for payment of money. When the learned magistrate had the application before him, it appeared that adultery had

(1) (1931) 95 J. P. 169.

(2) [1927] P. 154.

C. A.
1932

NATBORNY
v.
NATBORNY.

The President.

occurred some years before the date of the complaint, and the learned magistrate, following *Waller* v. *Waller* (1), held that as the matter complained of had taken place more than six months before the information, he had no jurisdiction. He was right as to the principle and on the authority of *Waller* v. *Waller*. (1) I pointed out in that case that if there is any apparent hardship in the principle, any real hardship has been removed by the Poor Persons procedure. This applicant has himself been a petitioner for relief in consequence of adultery as a poor person. The powers of the Court under the Matrimonial Causes Acts are ample to prevent injustice to either husband or wife when maintenance questions arise.

BATESON J. I agree. The cases of *Waller* v. *Waller* (1) and *Mellars* v. *Mellars* (2) show in my opinion that the Summary Jurisdiction Act, 1848, governs the whole of s. 7 of the Act of 1895. Even if it were not so, I should agree with the way in which the magistrate exercised his discretion.

Appeal dismissed.

R. M. M.

The husband appealed. The appeal was heard on June 24, 1932.

Maurice Lush for the husband.

S. D. Musson for the wife.

The arguments were substantially the same as those in the Court below.

[The following additional cases were referred to: *Dutch* v. *Dutch* (3); *Sephton* v. *Sephton* (4); *Rex* v. *Copestake* (5); *Bragg* v. *Bragg*. (6)]

LORD HANWORTH M.R. This appeal must be allowed. It raises an interesting little point which may be of some considerable importance in a number of cases. In 1916 the present appellant married, and there were two children of

(1) [1927] P. 154.
(2) 95 J. P. 169.
(3) (1928) 92 J. P. 197.
(4) (1888) 58 L. T. 281.
(5) [1927] 1 K. B. 468.
(6) [1925] P. 20.

C. A.
1932

NATBORNY
v.
NATBORNY.

Lord Hanworth
M.R.

that marriage. His wife died in 1923, and in 1924 he married again. There was considerable hostility between the spouses, and in August of that year, when the husband and wife were living at the wife's mother's house, the husband was turned out of the home, and he went and lived with an uncle. On October 13, 1924, he was summoned for desertion, and an order was made against him that he should pay his wife, for herself and the children, 30*s.* a week. He did make some payments, and apparently always paid a money contribution to the bringing up of the children, but he did not pay the full sum, I dare say because he felt indisposed to assist his wife. On June 16, 1930, he made an application to the magistrate, and for reasons good and sufficient the magistrate reduced the sum payable by the husband from 30*s.* a week to 20*s.* Later in that year, in July, 1930, the husband heard that his wife had been guilty of adultery, that adultery having taken place two years before, some time in 1928; but according to his statement, although there might be some controversy about it, he did not know or appreciate that until 1930.

On April 18, 1931, the husband presented a petition to the Divorce Court alleging adultery by his wife, which had been committed in 1928. On July 28 the wife put in an answer and, in the course of that answer, although she denied some of the adultery charges, she admitted that in August, 1928, she had committed adultery. There was a reply also. On November 5, 1931, the petition was heard: the wife did not contest it, and a decree nisi was made in the husband's favour. On May 30 of this year the decree was made absolute. After the decree nisi had been made, on December 16, 1931, the wife summoned her husband for the arrears of allowance which he had been ordered to pay to her. On December 17 the present appellant took out a summons and asked for the discharge of the order of October, 1924, as amended by the order of June, 1930, on the ground that the wife had committed adultery.

The hearing took place before the magistrate, and he clearly indicates in his judgment that the situation under the

C. A.
1932
NATBORNY
v.
NATBORNY.
Lord Hanworth
M.R.

sections, to which I will refer, is somewhat difficult. He felt himself bound to say this: that inasmuch as the adultery that had been charged, the admitted adultery, was of the date of August, 1928, it was more than six months before the application was made to him, with the result that, following what he thought was the decision in *Waller* v. *Waller* (1), he must refuse to make any order for the discharge of the order of October, 1924. The present appellant appealed to the Divisional Court, and that Court upheld the attitude of the magistrate and referred to *Waller* v. *Waller* (1) and one or two other cases, and from that decision the appeal is taken to this Court.

The point taken against the application of the husband to the magistrate is this: the statute under which the order of October, 1924, was originally made is a statute which was passed in 1895, and by s. 8 it provides that: "All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts . . . ." The Act itself is entitled "the Summary Jurisdiction (Married Women) Act, 1895." Now, all applications under this Act shall be made in accordance with the Summary Jurisdiction Acts, and I think that that is a plain direction to apply the system provided by the Summary Jurisdiction Acts, 1848 and 1879. It is provided by s. 1 of the Act of 1848 that justices may issue summonses "in all cases where complaint shall be made . . . . upon which . . . . they have . . . . authority by law to make any order for the payment of money or otherwise." There is the power. And by s. 11 it is provided that a time shall be limited for making such complaint, and that such complaint shall be made within six calendar months from the time when the matter of such complaint arose. It is a little difficult to determine, if it were necessary to do so, whether that means when the matter on which the complaint is based came to the knowledge of the complainant, or whether it refers to the date when the actual facts took place upon which the knowledge of the complainant is based. But, however that may be, it seems plain enough that the

(1) [1927] P. 154.

application is to be one to which a time limit of six months applies. Now, it is clear that there is no jurisdiction in the Divisional Court to alter the order that has been made by the justices: if authority were required for that it is to be found in *Bragg* v. *Bragg*.(1) The headnote in that case reads: "Dissolution of a marriage by a decree absolute of divorce does not ipso facto discharge a maintenance order previously obtained by a wife under the Summary Jurisdiction (Married Women) Act, 1895. Nor does such dissolution compel the Court of summary jurisdiction to discharge such an order. Every such case comes within the discretion given to the Court by s. 7 of the Act to vary or discharge the order on evidence of fresh facts."

In the course of his judgment in that case the learned President refers to s. 7 of the Act of 1895, and indicates that it is that section which provides the machinery which at the present time is lacking from the Divisional Court itself.

I turn, therefore, to see what is the meaning of the Act of 1895, and I think it is useful, as Mr. Lush has done, to call attention to the earlier Acts. The first Act to which our attention must be directed is the Matrimonial Causes Act, 1878, and that provides, by s. 4, that if a husband is convicted of an aggravated assault, and the Court is satisfied that the future safety of the wife is in peril, it may make an order of separation. It may further provide that the husband shall pay to his wife a weekly sum, and it is to be enforced against him, and the Court or magistrate shall have power from time to time to vary the sum on the application of a husband or wife, and so on. And then there is a proviso that no order for payment of money shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned, and provided that any order for payment of money may be discharged upon proof that the wife has, since the making thereof, been guilty of adultery. It will be observed, as Mr. Lush pointed out, that the original power to vary, and which is exercisable from time to time,

(1) [1925] P. 20.

is one which contains a proviso that that order for payment shall be discharged upon proof of adultery. The next statute is the Married Women (Maintenance in Case of Desertion) Act, 1886, and that was to amend the law relating to maintenance of married women who had been deserted by their husbands, and that enabled the Courts to make an order in favour of a wife who had been deserted. It will be noticed that the 1878 Act applied only to cases of aggravated assault: the 1886 Act gave additional power in any case of desertion. But again there was the power given to the justices from time to time to vary the sum, and there was also a proviso that no order for payment should be made in favour of a wife who should be proved to have committed adultery, unless such adultery had been condoned, and also a proviso that justices might rehear such summons at the instance of the husband at any time.

It would seem from those two statutes that there was power to alter, vary, discharge or rehear "at any time." Those statutes were put together in the statute with which we are dealing, the Act of 1895. It will be found that this repealed the whole of the Married Women (Maintenance in Case of Desertion) Act, 1886, and s. 4 of the Matrimonial Causes Act, 1878. So the two statutes to which I have been referring have now been incorporated together in this Act of 1895. I come, then, to see what has been done by s. 7 of that Act. It is thereby provided that a Court of summary jurisdiction may, on the application of a married woman or her husband, and upon cause being shown upon fresh evidence to the satisfaction of the Court, at any time alter, vary, or discharge any such order. The order that is there referred to is any order under the Acts mentioned in the Schedule thereto, and those are the Acts to which I have been referring. And the magistrate may, upon any such application, increase or diminish the amount of any weekly payment ordered to be made. Then the section goes on: "If any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged." Now, when I look at that, bearing in mind the terms of s. 8 of the Act of 1895, whereby all applications have to be made in accordance with the system of the Summary Jurisdiction Acts, it appears to be clear that the Court is given power when an application is made, to exercise a discretion in one case, and has a mandatory duty thrown upon it in the second. And more than that, one is confronted with the apparent injustice of a husband being unable to free himself from an order under which he is bound to make a payment to an adulterous wife if he falls within the time limit and is not able to make that application because the evidence is not then available; he cannot go to the Divisional Court and get free from it. And if this time limit is an impediment in his way it may be that many a man would suffer from this because the order has been made in the interests of his wife, and she has now found a new lover and is living with him, and at the same time her husband, in spite of her adultery, has no means of freeing himself from the original order. One hesitates to say that that is what the Legislature contemplated. It will be noticed that the opening words of s. 7 are: "A court of summary jurisdiction . . . . may . . . ." And it is upon cause being shown upon fresh evidence to the satisfaction of the Court, that "at any time" an application may be made. "At any time." The ordinary rules of construction of statutes seem to indicate that s. 7 freed the Act from the restriction which s. 8, in combination with s. 11 of the Act of 1848, imposed on an applicant, with the result that there is an opportunity to come at any time, and the six months' limit does not apply. The spouses may come at any time, and when that application is made there is freedom for the exercise of the discretion in all matters which have to be considered under the earlier part of the section. But if a married woman has committed adultery there is a direction given to the Court of summary jurisdiction as to what it is to do—that is to say, the order is to be discharged. That reading of the section seems quite plain

C. A.
1932

NATBORNY
v.
NATBORNY.

Lord Hanworth
M.R.

to me: it was a mandatory order or direction to the Court of summary jurisdiction, and that seems to be clear when one turns to look at s. 2 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, which amends s. 7 of the Act of 1895. Sect. 2 of the Act of 1925 is in these terms: "(1.) Section 7 of the principal Act (which provides, amongst other things, that if a married woman, upon whose application an order has been made under that Act, shall commit an act of adultery, such order shall upon proof thereof be discharged) shall have effect as though at the end thereof the following proviso were inserted :—'Provided that the court may, if the court think fit—(*a*) refuse to discharge the order if, in the opinion of the court, such act of adultery as aforesaid was conduced to by the failure of the husband to make such payments as in the opinion of the court he was able to make under the order.'" That seems to me a clear indication by the Legislature that whereas the duty of the Court was absolute in the case of adultery, now there shall be added to that section a proviso which will give the Court a certain discretion, and the proviso says that if the Court think fit they may refuse an order where there was conduct conducing.

Is there any difficulty in adopting that construction? It is said that *Waller* v. *Waller* (1) is an authority to the contrary and that it has stood for some time. I do not quite understand what the Court did intend to decide in that case, but it appears from the order they made that both the President and Hill J. thought that s. 7 does make it clear that an application to vary or discharge may be made at any time, but otherwise s. 11 of the 1848 Act applies. In other words, it seems to indicate that the Court were of opinion that these applications referred to in s. 7 were applications which could be made at any time, and that it was only "otherwise" that s. 11 imposed a time limit. It seems, therefore, that so far *Waller* v. *Waller* (1) does not conflict with the view that I have presented, but if it does, I do not hesitate to say that I do not accept its conclusions. In that

(1) [1927] P. 154.

C. A.
1932

NATBORNY
v.
NATBORNY.

Lord Hanworth
M.R.

case no reference was made to the discretionary power under the earlier part of s. 7, and I observe a note in Stone's Justices' Manual (ed. 1932) at p. 844 which says: "[*Waller* v. *Waller.*] In *obiter dicta* in *Mellars* v. *Mellars* (1), the words 'at any time' in the discretionary portion were overlooked." That is true, they were overlooked. They do, to my mind, answer and take away the restrictive effect of s. 11 of the Act of 1848, and the result is that where there is new evidence, where the evidence cannot reasonably have been obtained before, there is no restriction of the time limit of six months, and the matter can be brought before the Court and then, if it be proved that the woman has committed an act of adultery, the right course is to discharge the order, because the woman ought no longer to receive any money as maintenance from her husband.

The result will be that the appeal will be allowed, but the matter must go back to the magistrate, because he will have to exercise the discretion left open to him under s. 2 of the Act of 1925. When the magistrate said that he would not in any case have exercised his discretion in favour of the present appellant he (the magistrate) cannot have meant to indicate a concluded view; the magistrate is far too experienced to have expressed a final decision until all the material matters were before him. The appeal will be allowed, with such costs as the Poor Persons Rules provide, and the matter will be remitted to the magistrate.

SLESSER L.J. I agree that this appeal must be allowed. The Divisional Court in this case found themselves bound to follow a decision previously given by the Divisional Court in 1927 in *Waller* v. *Waller*. (2) Now that case seems to have proceeded on the assumption that s. 7 of the Act of 1895 contains two separate limbs. The Court appear to have taken the view that under the first limb an application might be made to alter, vary, or discharge an order, and that in the matter the magistrate would have a discretion, and they appear to have taken the view that an application to vary

(1) 95 J. P. 169.

(2) [1927] P. 154.

the amount under that limb might be made at any time. But proceeding to the second limb, they assume that an application might be made by the husband under these words: "If any married woman upon whose application an order shall have been made under this Act .... shall commit an act of adultery, such order shall upon proof thereof be discharged." On that they took the view that the limitation of six months imposed by s. 11 of the Act of 1848 from the time of the act of adultery, or possibly, as was suggested in a later case, from the time when knowledge of the act came to the attention of the applicant, would be a time of limitation. That is expressed in the judgment of Hill J. where he says (1): "Application to vary the amount may be made at any time. But otherwise it seems to me that s. 11 applies." Now, if that is the right construction of s. 7 of the Act of 1895, and I think that there is very great weight to be attached to the view expressed by the Divisional Court: indeed, if that application could be made under the second limb complaining only of an act of adultery, I think that it would be right to say, applying s. 8 of the Act of 1895, that all applications shall be made in accordance with the Summary Jurisdiction Acts, that s. 11 of the 1848 Act would apply, and that it would be a case where there being no time specially limited such complaint shall be made within six calendar months. But the error into which I think that the Divisional Court has fallen in *Waller* v. *Waller* (2) and the two subsequent cases that have been cited is this: I think that when one looks at s. 7 closely it appears that it does not contemplate two separate applications at all. There is only provision made for application to the Court in cases of varying, altering, or discharging orders, on one application, of the married woman or her husband. "A court of summary jurisdiction .... may, on the application of the married woman or of her husband .... alter, vary, or discharge any such order," and that application may be made "at any time." Now, if the application may be made "at any time," that means at any

---

(1) [1927] P. 161. (2) [1927] P. 154.

C. A.
1932

NATBORNY
v.
NATBORNY.

Slesser L.J.

time while the order is in force, then the case still falls within s. 11 of the Act of 1848, but within the excepting words: " . . . . where no time is already or shall hereafter be specially limited for making any such complaint. . . . ." And here, by s. 7 of the Act of 1895, the time is limited for making any such complaint, that is, the complaint is to be " at any time," the any time being any time during the currency of the order that is to be altered, varied, or discharged. Therefore, the first limb substitutes for the limitation of six months any time during the existence of the order. Now, the second part does not deal with a separate application at all; there is only one application possible, to alter, vary, or discharge, one of those three: all that the Legislature does therefore is to require that if the married woman shall commit an act of adultery such order shall be discharged. That is to say, in the case of discharge, not of alteration or variation, then the Court must, subject to the subsequent amendment in s. 2 of the Act of 1925, discharge the order, where otherwise there remains a discretion.

I observe that in *Waller* v. *Waller* (1) this argument was addressed to the Court by Mr. Eddy, who says this (2): " The effect of s. 7 as a whole is that the application to discharge may be made at any time and not necessarily within six months." But the Court seems to have been concerned rather with the question whether there was a complaint within s. 11 of the Act of 1848, and not to have considered the argument.

I state my views, which agree with those of my Lord, for three reasons. First, because we are differing from the Divisional Court; secondly, because we are differing from an existing practice; and thirdly, because the social consequences of this decision may be very serious indeed. I cannot but construe the section as I have indicated, and Mr. Lush has given me this further reason for differing from the lower Courts, that the whole history of this legislation goes to show that the earlier Acts did give power to apply " at any time," or " from time to time," and that the Act of 1895 has made the discharge mandatory in certain cases. It would be a remarkable result if an Act which, on the face of it, appears to have been intended to make an order mandatory, should nevertheless have put a limitation on the time within which the application should be made, which the earlier Acts have carefully abstained from doing. If the legislation had produced that result we should have given effect to it, but in my opinion we are not forced to any such absurdity.

---

(1) [1927] P. 154.

(2) [1927] P. 156.

ROMER L.J. I agree. If on fresh evidence an application is made under the first part of s. 7 of the Act of 1895 asking the Court to alter, vary, or discharge an order, and such fresh evidence shows that the wife has either voluntarily resumed cohabitation, or has committed an act of adultery, the Court no longer has the wide discretion that it would have had in other cases. It is compelled to discharge the order, subject only to the limited discretion now imposed on it by s. 2 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. It seems plain from the use of the words " at any time " in the first part of the section that the application is not limited to be made within the six months referred to in s. 11 of the Summary Jurisdiction Act, 1848. That was held, and in my opinion rightly held, by the Divisional Court in *Waller* v. *Waller*. (1) But that also applies to the second and mandatory part of s. 7, and an application under that part of the section can be made at any time and is not limited to six months. That being so, it appears to me that the magistrate in this case has no discretion in the matter except the limited discretion imposed on him by the amending Act of 1925. I agree, therefore, that the appeal must be allowed, and the case go back to the magistrate to exercise that limited discretion.

Appeal allowed.

Solicitors for husband: *Braby & Waller.*
Solicitors for wife: *Curwen, Carter & Evans.*

(1) [1927] P. 154.

W. I. C.

DONKIN *v.* DONKIN.

1932
Oct. 14.

Husband and Wife—Persistent Cruelty—Acts of Cruelty more than Six Months before Complaint or Information—Course of Conduct—Summary Jurisdiction (Separation and Maintenance) Acts, 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 4, 8, *to* 1925 (15 *&* 16 *Geo.* 5, *c.* 51)—*Summary Jurisdiction Act,* 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11.

By the combined operation of the Summary Jurisdiction (Married Women) Act, 1895, s. 8 (1), and the Summary Jurisdiction Act, 1848, s. 11 (2), a complaint by a married woman under s. 4 of the former Act that her husband has been guilty of persistent cruelty towards her must be made and information laid within six calendar months from the time when the matter of the complaint arose. On complaint made of a single act of cruelty arising within the time limited a court of summary jurisdiction is entitled on a summons in respect of persistent cruelty to receive evidence of further acts committed before the time limited as well as of the general conduct of the husband falling short of actual cruelty in arriving at a decision whether a course of conduct is established which is " persistent cruelty " within the meaning of the section.

By consent of the parties further agreed facts may be stated on an appeal from a court of summary jurisdiction in addition to the evidence before the Court below.

Appeal of the husband, William John Donkin, from the order of a court of summary jurisdiction finding him guilty of persistent cruelty to his wife, Ruby Josephine Donkin.

Information under the Summary Jurisdiction (Married Women) Act, 1895, s. 4, was laid on August 2, 1932. According to the evidence in the court of summary jurisdiction the husband committed one assault on his wife in the year 1928, a second in March, 1931, and a third in respect of which the summons was issued on July 29, 1932. There was further available on the appeal an agreed state of facts additional to the evidence given in the court below, reference to which is made in the judgment.

---

(1) Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 8: " All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts. . . . ."

(2) Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11: ". . . . In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

The justices found the husband guilty of persistent cruelty on the evidence before them and ordered him to pay to his wife 1*l.* per week and 5*s.* for a child of the marriage and costs. In their reasons annexed to the note of evidence they held themselves " entitled to take cognizance of the acts of cruelty committed more than six months before the making of the complaint to prove the persistent character of the cruelty and held that the several acts constituted persistent cruelty within the meaning of the Summary Jurisdiction Acts." The husband appealed on various grounds; the material ground being that the justices were wrong in law in holding that there was persistent cruelty within six months of the complaint.

Noel Middleton for the appellant. Persistent cruelty must consist of more than one act, and as the Summary Jurisdiction Acts of 1848 and 1925 are to be read together, which is the effect of s. 8 of the later Act, the result is that all the acts relied on as constituting persistent cruelty must be within the limit of six months of the complaint imposed by s. 11 of the earlier Act, as the later Act limits no time for complaining. Sect. 4 of the Act of 1895 deals with isolated assaults and persistent cruelty as separate and independent offences. Persistent cruelty is a course of conduct; in this case there is only a single act within the period limited, and that is not a course of conduct. Even if the acts alleged to have occurred in 1928 and 1931 can be coupled with that of 1932 as a course of conduct, the question remains whether the acts are not too far apart in time to come within the category of persistent cruelty.

W. Elliott Batt for the respondent was not called on.

THE PRESIDENT (LORD MERRIVALE). Counsel for the appellant has clearly presented two things of definite importance. As he has presented them, and as the matter has been discussed between counsel and the Court during the argument, I do not think that it is necessary to hear counsel on the other side.

1932

DUNKIN
v.
DUNKIN.

The President.

The cause of the summons which had been issued and which was dealt with by the justices in the order now appealed from was an assault on July 29 of this present year, and was a very grave charge, and the magistrates have believed that it took place. It did not stand alone. In 1928 there had been a violent assault, as the wife says, which had caused her to go home and leave the husband; but he persuaded her to go back, promising that he would behave himself, and she rejoined him. She also says that he drank to excess, and he went on drinking. Then in March, 1931, there was another quarrel. He struck her. That is corroborated. She says that there was then a promise of reformation and his mother intervened, and they made it up, and she went back. Then comes this assault in July, 1932, and thereupon there is a summons for persistent cruelty.

The Summary Jurisdiction Act under which this summons is taken out incorporates s. 11 of the Summary Jurisdiction Act of 1848, and s. 11 provides that a complaint or information under that Act must be made within six calendar months from the time when the matter of such complaint or information arose. Counsel for the appellant says (and it has an attractive sound about it): "There was an assault within six months, and there being no other assault shown within six months, the wife has charged the husband with persistent cruelty, but the statute creates persistent cruelty as a separate and distinct offence, and it must be so construed; accordingly, there being only that one instance of cruelty, of which evidence is given, within six months, it cannot be said that there was persistent cruelty within six months." That, of course, is a serious proposition. If the statute has that meaning, we have simply to obey it; but I put to counsel a case which I think approaches the proposition closely. Assume a man to have been guilty of constant ill-usage of his wife from January to the end of June and then to have gone away to sea until the end of December and come back and resumed his course of conduct on January 1, would that create an isolated act of cruelty or would it be matter judicially of persistent cruelty? I put one or two other cases to counsel. When a man who knows the state of the law beats his wife on January 1, and beats her on July 2, and systematically treats her in that way, would it be persistent cruelty? Counsel says " persistent " has a kind of rationalized meaning. I myself should have thought, that even if cruelty were rationalized, that would be a little irrational for the protection of married women. It seems to me that the real question is whether the cruelty which is shown to have taken place within the six months is part of a course of conduct—part of a course of cruelty—which was persistent.

Now we know a little more than what appears in the depositions of what the appellant's mode of life was. Do not let it be supposed that I am speaking censoriously merely to expose this man. I have to examine what his course of conduct really had been. He was a man who drank to excess and whose drinking to excess got worse, and during the six months before this instance of cruelty in July, 1932, although no blows were aimed at or given by the appellant to the wife or actual threats used, there were numerous unpleasant scenes in the course of which he made use of qualified threats such as "I would like to give you a good hiding" and other similar expressions falling short of an actual threat. The respondent wife did not in evidence allege that she was put in fear by such threats. But a man might be guilty if he did no more than use threats. If a man keeps his wife in fear and subjection by threats, he is guilty of cruelty.

I ought to say, perhaps, that I see with great satisfaction that the solicitors in this case have desired to help in the administration of justice by having the whole facts before the Court. I do not know any incident in any appeal in this jurisdiction which has struck me as more satisfactory. I think it was a proper thing to do.

The question really is whether these acts were isolated acts, or whether they were part of a course of conduct, and if they recurred and were linked up by the increasing subjection of the husband to the influence of intoxicating liquor, and being linked up in that way, were further linked up by the behaviour which is in evidence, I have come to the conclusion that this cruelty on July 29, 1932, was part of a course of conduct and that, therefore, it was part of cruelty toward the wife which was persistent. That being so, the main proposition on which the appeal depends fails.

Counsel submitted a subordinate proposition, and he said that the Court must, of course, consider the successive acts. It must not say, because there was one grave act, that that is persistent cruelty. I recognize that, but I think the whole thing was a grave matter. I think the course of conduct persisted and that the wife's peril from it increased. In that respect I think the justices were warranted in finding persistent cruelty.

There is one other thing I want to say. I was glad to find that the justices have not included in their order a provision for separation. There is a dangerous tendency to introduce automatically a separation order. It seems to me that the truth of the matter about this case is that here was a man who drank to excess, who became more subject to drinking, who perhaps could not then control himself, and became dangerous to his wife. She describes their home. She says they had a splendid home, but she says: "I would not go back to it." Now it is said that the husband is ready to give up intoxicants. I cannot help thinking that if he took that course and, after a period during which he has become a steady man, made approaches on the subject, it might be practicable for him to annul this order by reason of a reconciliation between the parties.

BATESON J. I agree.

Appeal dismissed with costs.

Solicitors for the husband: *Dangerfield, Blythe & Co., for Hugh L. Swinburne, Durham.*

Solicitors for the wife: *Wrinch & Fisher, for H. R. Snowball, Consett.*

R. M. M.

1932
July 19, 20;
Oct. 20.

THE BATHORI.

Prize Court—International Law—Damages—Outbreak of War—Enemy Ship—Capture while under Safe Conduct—Hungarian Company—Status of Fiume—" Nationals of the former Kingdom of Hungary "—Effect of Peace Treaty—Treaty of Trianon.

In September, 1914, the *B.*, a merchant ship owned by the plaintiffs, then a Hungarian company, was captured in the Atlantic by one of H. M. ships. The *B.* was sailing under a safe conduct issued by the French authorities and countersigned on behalf of Great Britain, but the movements of the *B.* were considered suspicious, and, as it was impracticable to take her to a British port, she was sunk. It was ultimately admitted, however, that she had not forfeited her safe conduct.

At the time the *B.* was sunk her owners were registered at Budapest as a company carrying on business at Fiume, then a Hungarian port. From April, 1920, the company was domiciled at Fiume only. At the date of the Treaty of Peace between the Allied and Associated Powers and Hungary (the Treaty of Trianon, signed June 4, 1920), Fiume was not occupied or governed by Hungary, but was in control of Gabriele d'Annunzio who had declared himself dictator in 1919. In July, 1921, Italy and Yugoslavia, with the concurrence of the Powers, declared Fiume to be a State having full liberty and independence. In 1924, Fiume was formally annexed to Italy.

By art. 53 of the Treaty of Trianon Hungary renounced " all rights and title over Fiume and the adjoining territories which belonged to the former Kingdom of Hungary," and by art. 232 the Powers reserved " the right to retain and liquidate all property, rights and interests " which belonged at the date of the coming into force of the Treaty to " nationals of the former Kingdom of Hungary or companies controlled by them " within the territories or under the control of those Powers.

In an action by the plaintiffs, described as " a corporation established under Italian law," for damages :—

Held, (i.) that the sinking of the *B.*, as an act of war committed by one of the commissioned officers of the State, was a breach of the obligation accepted by the State, but, (ii.) that the right to claim compensation failed, inasmuch as—(*a*) Hungary had power under the recognized principles of international law to bind citizens and denizens of Fiume; (*b*) the plaintiffs were, within the term of the Treaty, " nationals of the former Kingdom of Hungary or companies controlled by them" ; and (*c*) their right to claim compensation fell within the terms "property, rights and interests" under the control of one of the Powers—namely, Great Britain, and, therefore, had passed from the plaintiffs at the date the proceedings were instituted.

Action in Prize.

The plaintiffs were " Adria Società Anonima di Navigazione Marittima (a corporation established under Italian law) and the master and crew of the steamship *Bathori*"; the defendants were H. M. Procurator-General and Captain Percival Henry Warleigh, R. N.

The plaintiffs' claim was for the "costs, expenses, loss and damages occasioned by reason of the wrongful capture, seizure, loss and destruction on the high seas on September 1, 1914, of the *Bathori* by H. M. S. *Minerva* under the command of the defendant (Captain Warleigh), while the *Bathori*, with the licence of the British, French, American and Spanish Government authorities was proceeding from Havre to Vigo."

In their petition the plaintiffs alleged that the *Bathori*, owned by a Hungarian company, and sailing to Vigo under a safe conduct granted by the French authorities and countersigned by H. B. M. Consul-General at Rouen, was wrongfully and without probable cause captured and sunk by the *Minerva*.

The defendants' answer was that the *Bathori* had forfeited the protection afforded by the safe conduct, inasmuch as she was not steering for Vigo, did not stop when signalled to but increased her speed, and only stopped when the *Minerva* fired two blank shots. Owing to lack of fuel it was impossible to take the *Bathori* to a British port, and after the crew had been removed she was sunk. The defendants further pleaded that if, contrary to their contention, it should be held that the plaintiffs were, at any time before the Treaty of Peace between the Allied and Associated Powers and Hungary came into force, entitled to any relief arising out of the capture, their claim was barred by the provisions of that Treaty (the Treaty of Trianon).

Before the hearing it was admitted by the defendants that the safe conduct had not been forfeited, and at the hearing the arguments were limited to the question of the plaintiffs' rights, if any, to damages, having regard to the provisions of the Treaty. All the material articles are set out in the judgment. A plea of laches was put on the record, but it appeared that the parties had been in touch over a long period and the plea was not raised at the hearing.

Stuart Bevan K.C. and *Sir Robert Aske* for the plaintiffs. The Treaty of Trianon does not affect the plaintiff company at all, for it was at no material time a "national of the Kingdom of Hungary." At the date of the Treaty the company was registered in Fiume, and Fiume, which had been declared an independent unit, was under the dictatorship of d'Annunzio. Hungary ceased to have any authority over Fiume or its inhabitants in October, 1918, and in 1921 Italy and Yugoslavia, with the concurrence of the Allied and Associated Powers, declared Fiume to be independent. Further, by art. 53 of the Treaty Hungary renounced all rights over Fiume and, therefore, had no power to bind corporations in the position of the plaintiffs, and if she purported to do so such provisions are of no effect; but in fact the definition in art. 246 of "nationals of the former Kingdom of Hungary," which must have some limitations, makes no mention of companies or corporations. On all these grounds the cases of *Rothschild* v. *Administrator of Austrian Property* (1) and *Groedel* v. *Administrator of Hungarian Property* (2), which, so far as they go, are against the plaintiffs' contentions, are distinguishable, and further do not bind the Prize Court.

In any event the plaintiffs' rights in international law under The Hague Convention are not affected. Under arts. 1 and 3 of Convention VI. of 1907 the *Bathori* was entitled to proceed to her port of destination. She had been furnished with a pass and was wrongfully sunk, an act, apart altogether from The Hague Convention, unwarranted in international law, and entitling the plaintiffs to damages: *The Acteon.* (3) The Treaty waived questions of compensation for "loss," but not for the wrongful destruction of personal property; in no case could the waiver affect the Crown where there has been a wrongful seizure and sinking. *The Blonde* (4) establishes that Convention VI. governs the case of the *Bathori*, and that there was no right in the Crown to capture or destroy her. A claim for damages is not barred under

(1) [1923] 2 Ch. 542.

(2) (1927) 44 Times L. R. 65.

(3) (1815) 2 Dods. 48.

(4) [1922] 1 A. C. 313.

art. 232; it is not "property, rights or interests" within the meaning of that article.

The Solicitor-General (*Sir Boyd Merriman K.C.*) and *Hubert Hull* for the defendants. The plaintiffs cannot found a claim based on a breach of the VI. Hague Convention, for the terms of art. 1 were in fact complied with. The *Bathori* was "furnished with a pass" and was "allowed to proceed"; the sinking was an independent act of the commander of the *Minerva*. Either the compensation claimed is the res, in which case it disappears under Annex III. (1.) of the Treaty, or, if not equivalent to the res, it is simply a claim for loss or damage waived under Annex III. (7.), and also under art. 360: cf. *The Blonde* (1) in reference to a similar claim by citizens of the Free City of Dantzig barred under the Treaty of Versailles. Alternatively, if necessary to go outside Annex III., the claim is disposed of by art. 232. Hungary had power to conclude a bargain on behalf of Fiume and its inhabitants, and the plaintiffs are, within the meaning of the Treaty, "nationals of the former Kingdom of Hungary or companies controlled by them." They did not cease to be nationals until the Treaty came into operation, and their claim is a "right or interest" in and under the control of Great Britain, and falls to be retained and liquidated by her. The claim, therefore, is abortive.

Sir Robert Aske in reply, on the meaning of "loss," cited *Austin Friars Steam Shipping Co.* v. *Strack.* (2)

Cur. adv. vult

Oct. 20. THE PRESIDENT (LORD MERRIVALE) read the following judgment: The plaintiffs respectively sue as the owners and the master and crew of a cargo vessel, the steamship *Bathori*, which on September 1, 1914—in the early days of the great war—was captured and sunk at sea as an act of war in the Atlantic some thirty miles off Vigo, by H. M. S. *Minerva*, under command of the defendant, Captain Percival Henry Warleigh, R.N.

(1) [1922] 1 A. C. 313.

(2) [1905] 2 K. B. 315.

By consent the hearing before me was limited to two specific matters with which I shall presently deal.

The case presents various remarkable features—apart from the fact that it comes here as a case in prize commenced in 1930 in respect of an alleged wrong suffered in September, 1914.

The vessel in question, when she was captured and sunk, was an enemy ship proceeding in ballast on a voyage from Havre to Vigo under a grant of safe conduct made by the French Naval authorities and countersigned and confirmed on behalf of, among other Powers, Great Britain—France and Great Britain being then at war with Austro-Hungary.

It is admitted on behalf of the defendants that—contrary to the view then taken by the defendant, Captain Warleigh—the safe conduct had not been forfeited and was in force at the time the *Bathori* was sunk.

The *Bathori* was a ship of 2223 tons gross register, English built in 1892, the property of Hungarian owners, a società anonima, incorporated and duly registered in 1881 at Budapest as a company carrying on its business at and from Fiume, then a Hungarian port. At the time when the *Bathori* was sunk, and until 1920, her owners remained so incorporated and registered. The plaintiffs say in their petition that " on the 8th December, 1919, by resolution of the shareholders the name of the società was changed. . . . . the registration of the società at Budapest was cancelled and the società was and still is registered at Fiume only," but this statement is qualified, as follows, in the agreed statement of facts: " From the 28th December, 1918, until the 20th April, 1920, the domicil of the principal offices of the società was at Budapest and Fiume and from and after the 20th April, 1920, the domicil of the principal office . . . was at Fiume only."

An outstanding question in the arguments at the hearing of the case was that of the national and international status of Fiume at various periods, during and after the war, and the effect of such status upon the position and claims of the claimant società.

From an early period in the war Fiume was marked out by the Allied and Associated Powers as territory of which Austro-Hungary would be deprived in the event of the defeat of that Power, and its disposal was ultimately decided after various hostile occupations by a complex series of international compacts which have had as their ultimate result the incorporation of Fiume in the Kingdom of Italy.

Under the war treaty of 1915, to which the Allied and Associated Powers were parties, it had been agreed that Fiume, if taken from Hungary, would be handed over to "Croatia-Serbia and Montenegro," then apparently conceived of as an autonomous sovereignty to be established by process of war. By the Treaty of Trianon, which restored peace between Hungary and the Powers, and bears date June 4, 1920, Hungary renounced all right and title over "Fiume and the adjoining territories," and undertook "to accept the dispositions made in regard to these territories, particularly in so far as concerns the nationality of the inhabitants, in the treaties concluded for the purpose of completing the present settlement." These last mentioned treaties are manifestly those described in certain articles of the Treaty of Trianon as "to be concluded."

At the date of the Treaty of Trianon Fiume was not occupied or governed by any of the Powers who were signatories of the Treaty. In November, 1918, certain denizens of the territory of Fiume who asserted Yugoslav nationality had declared themselves a Yugoslav Council for its administration. In December, 1918, an Italian Council contesting this control had declared Fiume an independent political unit. In September, 1919, a belligerent force under the command of Gabriele d'Annunzio had taken control, without sanction of the Italian Government. D'Annunzio declared himself Dictator, and he remained in control at the date of the Treaty of Trianon, and until after the conclusion of the Treaty of Rapallo whereby in July, 1921, Italy and Yugoslavia with the concurrence of the Powers declared Fiume to be "a State having full liberty and independence." Great Britain, Italy, Hungary, and Yugoslavia were among the Powers which ratified this treaty. Ultimately in January, 1924, after negotiations which had extended over years, the Italian Government and the Yugoslav Government concluded an arrangement whereby Yugoslavia recognized "the full and entire sovereignty of Italy over Fiume," and as a consequence on March 16, 1924, H. M. the King of Italy conducted the ceremonial act of annexation whereby Fiume definitely became Italian territory.

A Convention to which Italy and Yugoslavia were parties was signed in July, 1925, and duly ratified, framed with a view to the settlement of the rights of denizens of Fiume, as affected by the war and the consequent series of treaties, and the matter is dealt with in the following article :—

"Natural or juridical persons who have acquired within six months from the date of the entry into force of the present agreement the nationality of either of the High Contracting parties shall be granted all the rights conferred by art. 249 of the Treaty of St. Germain-en-Laye and art. 232 of the Treaty of Trianon respectively on nationals of the former Austrian Empire and nationals of the former Kingdom of Hungary who have acquired the nationality of an Allied or Associated State in accordance with the provisions and within the time limits laid down by the said Treaties."

By an Italian royal decree signed in May, 1927, it had been declared that "bodies with legal personality, including commercial companies having their head offices in Fiume, and the incorporation of which is registered with the competent authorities at Fiume, are considered to be Italian." This, of course, applies to the plaintiff corporation, and in view of the admission of the parties that from and after April 20, 1920, the "domicil of the principal office" of the plaintiff società was at Fiume several years before the commencement of this action, the società was, therefore, as it now is, an Italian corporation entitled to assert all the rights conferred by art. 232 of the Treaty of Trianon on "nationals of the former Austrian Empire who have acquired the nationality of an Allied or Associated State."

No reference was made before me to the terms of the Treaty of St. Germain-en-Laye.

The relevant provisions of the Treaty of Trianon include arts. 49, 53, 61, 63 ; arts. 161, 162 ; Part VIII., Annex III. ; art. 232, art. 233, Annex II. ; art. 246 and art. 360.

By art. 49 Hungary renounces in favour of Czecho-Slovakia certain rights over Austro-Hungarian territory.

By art. 53 she renounces all right and title over Fiume and the adjoining territories, and undertakes to accept disposition to be made in regard thereto in consequential treaties, particularly in regard to the nationality of the inhabitants.

By arts. 61 and 63 citizens of the renounced territories are able to obtain citizenship under the changed sovereignty subject to certain options.

Art. 162 founds a right in the Allied or Associated Governments (and their nationals) to reparation for the loss and damage to which they have been subjected as a consequence of the war, and arts. 163–169 with Annex III. set forth the processes by which compensation shall be obtained. Under Annex III. (1.) the Hungarian Government agree on behalf of themselves and so as to bind all other persons interested to cede to the Allied and Associated Governments the property in " all merchant ships . . . . belonging to nationals of the former Kingdom of Hungary." (7.) and under III. (7.) " waive all claims of any description against the Allied and Associated Governments and their nationals in respect of the detention, employment, loss or damage of any Hungarian ships or boats."

Art. 232 of the Treaty, which is mentioned in the paragraph before cited of the Fiume Convention signed on behalf of Italy and Yugoslavia in July, 1925, declares that subject to certain reservations " the Powers reserve the right to retain and liquidate all property, rights and interests which belong at the date of the coming into force of the present Treaty to nationals of the former Kingdom of Hungary or companies controlled by them, and are within the territories . . . . of such Powers . . . . or under the control of those Powers."

Art. 233, Annex II., provides that " no claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or department of the Government of such a Power by Hungary or by any Hungarian national or by any national of the former Kingdom of Hungary wherever resident in respect of any act or omission with regard to his property, rights or interests during the war."

Art. 246 defines meanings for the terms " Hungarian national " and " national of the former Kingdom of Hungary."

Under art. 360 Hungary undertakes " not to put forward directly or indirectly against any Allied or Associated Power, signatory of the present Treaty, any pecuniary claim based on events which occurred at any time before the coming into force of the present Treaty " and the article contains this provision : " The present stipulation will bar completely and finally all claims of this nature, which will be thenceforward extinguished, whoever may be the parties in interest."

So far as regards the provisions of all the cited articles of the Treaty of Trianon it is proper to add that by an agreement concluded at The Hague in 1930 the Allied and Associated Powers undertook as from the coming in force thereof to cease to exercise under the Treaty of Trianon rights of retention and liquidation of property, rights and interests of nationals of the former Kingdom of Hungary in so far as such property, rights and interests had not already been finally disposed of. The consideration for this is a limited annual payment by the Hungarian State.

Having regard to the tenor of the arguments raised at the hearing I have considered all the provisions of the Treaty of Trianon to which I have referred. As to most of them, however, it may, I think, be correctly said that they have less direct bearing on the questions here at issue than upon the general scope, intent and applicability of the Treaty as regards the rights and claims of the plaintiff società.

Two specific questions have to be determined on the present occasion. First, was the sinking of the *Bathori* an act

1932

THE BATHORI.

The President.

contrary to an accepted obligation of the British State which entitled the owners, whenever they might again become competent suitors before a British tribunal, to come to this Court having jurisdiction in prize and claim restitution in value of the vessel, with or without further compensation; or was it simply an act of war warranted by international law in respect whereof neither the British officer who sank the vessel, nor the State whose commission he held, could be called in question by legal process? Secondly, assuming that the sinking of the *Bathori* was a wrongful act, actionable in this Court, by reason of the terms as regards Great Britain, on which she was making her voyage, can an action in prize be now maintained in view of the terms of the Treaty of Trianon whereby peace was concluded between Great Britain and Hungary?

As to the question whether the sinking of the *Bathori* as an act of war while she was under safe conduct gave the owners a right of suit to recover her value under a writ in prize, the terms of The Hague Convention No. VI. of 1907, were mainly considered at the hearing. It must not be forgotten, though, that as long ago as the American War of 1812 Lord Stowell, then Sir William Scott, held that the unjustifiable sinking of an enemy ship which was sailing under safe conduct was an act in respect whereof restitution in value with damages must be awarded under the jurisdiction in prize: *The Acteon.* (1) The learned judge said this: "The natural rule is, that if a party be unjustly deprived of his property he ought to be put as nearly as possible in the same state as he was before the deprivation took place." Again, after the Russian War of 1854, Dr. Lushington, as judge of the Court of Admiralty, sitting in prize, examined various cases (*The Troija* (2); *The Phœnix* (3)) where the seizing or sinking of enemy ships was alleged to have taken place contrary to the terms of an Order in Council of H. M. Queen Victoria which granted a limited period of safe conduct to enemy ships found in British ports at the date of the declaration of war. Dr. Lushington in these cases recognized the effective force of safe conduct so given, and declared that a liberal construction ought to be put upon a public document which declared the security of belligerent rights. In the present case there was safe conduct, and the enemy owner was entitled for the time being to have it observed.

---

(1) 2 Dods. 48, 51.

(2) (1854) 1 Spink, 342.

(3) (1854) 1 Spink, 306.

As to the more general question of the effect of The Hague Convention No. VI., arts. 1 and 3 of that Convention were particularly relied upon by Mr. Bevan for the plaintiffs. He supported his argument by reference to the judgment of the Privy Council in *The Blonde.* (1) The Solicitor-General contended, on the other hand, as to the articles so relied upon, that they plainly do not in their express terms apply to the sinking of the *Bathori.* She was, he said, "allowed to depart freely" and "to proceed to" a designated port, and subsequently was sunk on the high seas by "the independent act" of one of H. M. ships of war. He moreover relied on some passages in the judgment in *The Blonde* (1) as tending to establish the case of the Procurator General under the second question which I have stated.

Art. 2 of the Convention clearly does not apply to the *Bathori*, which never was requisitioned and is not within the terms of the judgment in the case of *The Blonde.* (1)

Art. 1 taken literally would appear merely to enunciate a principle—that when a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable she should be allowed to depart freely either immediately, or after a reasonable number of days of grace, and to proceed after being furnished with a pass direct to her port of destination or any other port indicated to her.

His Majesty's Government in dealing with the *Bathori* purported to act upon the principle so enunciated and "allowed the vessel to proceed after being furnished with a pass" on a voyage to a "port indicated to it." As to the act of war which sank the *Bathori*, it may have been an "independent act" of a naval officer acting within his commission, but in my judgment it was an act of war, not of piracy, and not of mere civil strife, and as an act of war committed by one of the commissioned officers of the State it was a breach of the obligation accepted by the State.

---

(1) [1922] 1 A. C. 313.

The case of *The Blonde* (1), it must further be pointed out, arose under circumstances essentially different from those of the present case. She was an enemy ship—of German ownership when seized and duly requisitioned under the terms of art. 2 of the Convention—and the judgment decided that having been so requisitioned and lost at sea while so requisitioned her appraised value was prima facie payable. Then arose the question whether under the Treaty of Versailles, whereby Germany made peace with the Allied and Associated Powers, the sum representing this appraised value had been effectually made over by Germany to Great Britain so as to be irrecoverable, notwithstanding that between the events in question and the ratification of the Treaty the owners of the vessel had become citizens of the Free City of Dantzig.

Whether the "safe conduct" or "pass" under which the *Bathori* sailed be regarded as an act of a sovereign State independently of the Convention, or as an act of the State on the footing of the Convention, the result practically seems to me to be that the *Bathori*, having been granted immunity, was sunk contrary to the terms of the grant of safe conduct, and that therefore a claim resulted to the owners to recover her value as soon as their disability to sue by reason of the state of war had been removed.

The second question raised for determination here, as I have said, is whether the owners of the *Bathori* have cause of action in prize now notwithstanding the provisions of the Treaty of Trianon.

By Annex III. of the Treaty the Hungarian Government agree "on behalf of themselves and so as to bind all other persons interested" to cede "the property in all merchant ships belonging to the former Kingdom of Hungary"; Annex III. (7.) waives "all claims against the Allied and

(1) [1922] 1 A. C. 313.

Associated Governments and their nationals in respect of the detention, employment, loss or damage of any Hungarian ships or boats" ; art. 232 reserves to the Powers "the right to retain and liquidate all property, rights and interests" which belonged at the date of the coming into force of the Treaty to nationals of the former Kingdom of Hungary or companies controlled by them and "which are within the territories . . . . of such Powers . . . . or under the control of those Powers" ; art. 233, Annex II., precludes all claims against an Allied or Associated Power, or any person acting on behalf of or under the direction of any legal authority or department of the Government of such a Power, by any Hungarian national or by "any national of the former Kingdom of Hungary" in respect of "any act or omission with regard to his property, rights or interests during the war" ; and by art. 360 Hungary undertakes not to put forward "any pecuniary claim based on events which occurred at any time before the coming into force of the Treaty," such stipulations to bar completely and finally all claims of this nature "whoever may be the parties in interest."

Mr. Bevan and Sir Robert Aske contended that upon a strict construction of Annex III. (1.) the *Bathori* was not at the date of the Treaty a merchant ship and so would not pass, and that the claim of the plaintiffs is not a claim within the terms of Annex III. (7.) in respect of the "detention, employment, loss or damage of any Hungarian ships or boats." On the latter point they relied on the decision in *Austin Friars Steam Shipping Co.* v. *Strack.* (1) As to art. 232 they argued that the right of the plaintiffs in respect of the *Bathori* does not come within the description "property, rights or interests . . . . within the territory . . . . or under the control" of Great Britain. As to the whole matter they asserted that the Treaty of Trianon could not and does not bind the plaintiffs; that they were not Hungarian nationals when the treaty was concluded or indeed at any time after October (or alternatively December),

(1) [1905] 2 K. B. 315.

1918; that they were not within the scope of the term "nationals of the former Kingdom of Hungary"; and that, at any rate, upon the proper construction of the various clauses, a corporation such as the plaintiffs could not be held to fall within the terms of the Treaty.

The Solicitor-General did not press under Annex III. (1.) for a decision that the *Bathori* was within the terms of the Treaty "a merchant ship" to be ceded by Hungary. Under Annex III. (7.) he submitted that the present claim is a claim arising out of "loss" of a ship and so a waived claim. Under art. 232 he contended that the plaintiffs' claim in prize—the cause of action now presented—falls within the term "property, rights and interests" and therefore had passed from the plaintiffs when these proceedings began. He insisted also that under art. 360 the claim is a pecuniary claim of nationals of the former Kingdom of Hungary which can no longer be put forward, by reason that at the time of the Treaty the plaintiff società was in contemplation of international law a party as to whose rights Hungary might effectually agree. The last mentioned submission raises the whole question of the status of Fiume and its denizens during the transitional period which ended, as before mentioned, with its incorporation in the Kingdom of Italy; and in particular the power of Hungary to deal with the rights of the plaintiff società, as is said to have been done under the Treaty of Trianon.

To identify the sovereign authority which, according to international law and usage, could effect or sanction changes in the status of Fiume and its denizens subsequently to the time when the last Austro-Hungarian Governor departed is manifestly a serious task. This, I think, may be safely premised—sovereign authority is involved in the existence of a civilized community, whether such community is a separate national entity or forms part of a wider State. It is undisputed, and seems to me indisputable, that until late in 1918 the Hungarian State was sovereign over Fiume. Neither party asserts any other sovereignty down to the time when the Hungarian authorities left Fiume toward the end of 1918. The Yugoslav Council which asserted authority in 1918 had only a transitory existence. The Italian Council which in December, 1918, declared the independence of Fiume, whatever the character or intent of its temporary power, was in September, 1919, displaced by force of arms by d'Annunzio, whose forcible occupation of the area continued at the date of the Treaty of Trianon and until the subsequent Treaty of Rapallo. It was under the latter Treaty that in July, 1921, Fiume became under international sanction a State having "full liberty and independence."

What is now in question is whether at the date of the Treaty of Trianon Hungary was entitled, under recognized principles of international law, to bind citizens and denizens of Fiume by the terms of that Treaty, so that the articles now called in question must be regarded as valid.

Authoritative legal decisions directly bearing on the matter thus brought under consideration are, naturally enough, hard to find. Lord Stowell in *The Fama* (1) recognized that to change the national character of a place surrendered during war by an enemy something more than possession is required, and in various American cases this principle is clearly enunciated.

The American cases are authority for the view that a territory conquered by an enemy is not to be considered as incorporated into the dominions of the conqueror without a renunciation or a treaty of peace or a long and permanent possession : *United States* v. *Hayward* (2) ; *United States* v. *Rice.* (3)

United States v. *Hayward* (2) is distinguished by one of the well known judgments of Story J. It raised a question during the Anglo-American War of 1812–15 as to whether United States law as to the landing of certain classes of goods at American ports was operative at the port of Castine in Massachusetts. The port with the surrounding district had been captured and was being held by forces of the British Government, and it was proclaimed by the Governor of Nova Scotia to be British territory. The judgment on appeal

(1) (1804) 5 C. Rob. 106.

(2) (1815) 2 Gall. 485, 501.

(3) (1819) 4 Wheat. 246.

from the State Court of Massachusetts delivered in the United States Court by Story J. contains a passage relevant to the present inquiry: "By the conquest and occupation of Castine" the learned judge said, "the sovereignty of the United States over the territory was, of course, suspended. . . . . Castine therefore, could not, strictly speaking, be deemed a port of the United States; for its sovereignty no longer extended over the place. Nor, on the other hand, could it strictly speaking be deemed a port within the dominions of Great Britain, for it had not permanently passed under her sovereignty. . . . . It could only be by a renunciation in a treaty of peace, or by a possession so long and permanent, as should afford conclusive proof, that the territory was altogether abandoned by its sovereign, or had been irretrievably subdued, that it could be considered as incorporated into the dominions of the British sovereign."

There could not, I think, be clearer proof in point of fact of the status of Fiume in 1920 than that which is afforded by the Treaty of Trianon itself. Great Britain, Italy, the Serb-Croat-Slovene State and Czecho-Slovakia required from Hungary and accepted as a condition of peace Hungary's solemn renunciation of all right and title over Fiume and the adjoining territories and her undertaking to accept the dispositions to be made in regard to these territories in treaties to be thereafter concluded for the purpose of completing the settlement.

No new sovereignty de facto or de jure had come into being in Fiume when the Treaty of Trianon was concluded on June 4, 1920. Down to December 28, 1918, the plaintiff società was a Hungarian corporation pure and simple. Thence till April, 1920, the corporation had principal offices in Budapest and in Fiume. From April, 1920, it had its seat in Fiume only. Fiume, however, had no independent civil entity until July, 1921, when by virtue of the powers reserved under the Treaty of Trianon Italy and Czecho-Slovakia established it as a Free State.

All that is necessary to establish in favour of the Procurator General the first of the contested propositions

—namely, that the plaintiff-owners of the *Bathori* are within the terms of the Treaty of Trianon, is to show that they, at the date of the Treaty, were within the prescribed category "nationals of the former Kingdom of Hungary or companies controlled by them," as to whose possessions under the control of the Allied and Associated Powers Hungary and the Powers could make agreements of valid dispositive effect.

The judgment delivered by Lord Sumner in *The Blonde* (1) contains a passage which seems to me to be in point. There the claimants were citizens of the newly created Free City of Dantzig and the matter in question was that part of the Treaty of Versailles which rendered their ships liable to be appropriated toward satisfaction of the treaty obligations of Germany to the Allied and Associated Powers. "It was urged," Lord Sumner says, "that a Court of Prize can condemn only as against an enemy subject. Conceding that the power is exercisable after the conclusion of peace, it was said only to apply to those whose allegiance or citizenship is the same as it was before that time, though peace has converted enmity into amity; hence as against the subject of a newly constituted State, though formerly they were German, the right to condemn has ceased. The contention was not rested on any authority, nor was it explained why proceedings which were regular from the beginning should be frustrated as against the captors by a stipulation in the Treaty which does not deal with their rights but is directed to another and very different object."

The plaintiff società being found, as I find them to be, within the class of persons described in the Treaty, it becomes necessary to determine whether the suspended right to claim compensation in respect of the sinking of the *Bathori* which they had in 1914 comes within the words in art. 232 of the Treaty: "property, rights and interests within the territories" . . . . "or under the control" of Great Britain. Whether a claim in prize can quite accurately be described as a chose in action I need not pause to consider. As a chose in action and in the legal sense "property" it would have

(1) [1922] 1 A. C. 313, 338.

1932

THE BATHORI.

The President.

its locality in the State where the chose in action could be enforced. The "right," so long as it subsisted, was a right in respect of an injury suffered on the high seas to recover money in this Court which was irrecoverable elsewhere. It seems to me clear that the claim of the plaintiff società in respect to the sinking of the *Bathori* falls within the definition in question and within the operative words of art. 232.

On these findings it is conceded that the claim for damages fails.

Solicitors for the plaintiffs: *Swepstone, Stone, Barber & Ellis.*

Solicitor for the defendants: *The Treasury Solicitor.*

E. C. M. T.

BEAUMONT *v.* BEAUMONT.

C. A.

1932

Nov. 10.

Divorce—Practice—Abatement of Suit—Wife's Costs—Security—Death of Husband before Trial—Jurisdiction to order Taxation and Payment of Wife's Costs out of Fund in Court.

After abatement of a divorce suit by reason of the death of the husband before trial, the Court still has jurisdiction in the suit to order taxation and payment of the wife's costs properly incurred before the husband's death out of a fund lodged in Court by the husband as security for the wife's costs of and incidental to the hearing.

Hall v. *Hall* (1864) 3 Sw. & Tr. 390 and *Cunningham* v. *Cunningham* (1897) 77 L. T. 405, and dicta of Shearman J. in *Maconochie* v. *Maconochie* [1916] P. 326, 328, and of the President in *Coleman* v. *Coleman* [1920] P. 71, 74, approved and followed.

Decision of Bateson J. [1932] P. 158 reversed.

APPEAL from a decision of Bateson J. (1)

On October 27, 1930, the wife, Annie Lilian Halton Beaumont, filed a petition for judicial separation on the ground of the alleged cruelty of the husband, Percy Edgar Beaumont. On March 6, 1931, the husband filed his answer and claimed a judicial separation at his instance. On July 10, 1931, the suit being ripe for hearing, an order was made that the

---

(1) [1932] P. 158.

C. A.
1932

BEAUMONT
v.
BEAUMONT.

husband should pay to the wife or her solicitors 43*l.* 7*s.* 1*d.*, the amount of the wife's taxed costs up to the setting down, and further lodge in Court the sum of 200*l.*, "to cover the costs and expenses of the petitioner of and incidental to the hearing of the cause or give a bond" for payment of these expenses. The latter amount was lodged in Court. On November 12, 1931, it was further ordered that the husband should pay to the wife's solicitors 153*l.* 4*s.* 1*d.*, being the amount of the costs of proceedings by the wife for alimony pendente lite and of attachment proceedings prosecuted by her. On November 14, 1931, there was an order for further security of 320*l.* This order was not complied with, but the sum of 70*l.* was recovered by way of execution. On January 8, 1932, the husband died before the proceedings came on for trial.

On February 26, 1932, a registrar made an order giving the wife leave to file a bill of her further costs, but the taxing registrar refused to proceed with the taxation of the bill in the absence of any further order as to the wife's costs. On March 14, 1932, the registrar who had made the order of February 26, 1932, made a further order varying his former order, giving the wife liberty to tax her costs, ordering that after taxation the fund in Court should be paid out to the wife's solicitors on their undertaking to pay any balance over and above the amount of the taxed costs to the personal representative of the husband, and giving the personal representative of the husband liberty to attend the taxation.

The husband's executor then took out a summons calling on the wife to show cause why the registrar's order of March 14, 1932, should not be set aside, as having been made without jurisdiction, and why the summons on which that order was made should not be removed from the file, as improperly lodged in a suit which had abated.

Bateson J. said that in the present case, which had never been heard at all, there was no order for payment of the wife's costs, and until there was an order for costs there ought not to have been an order for taxation of costs. The action having abated no order for costs could now be obtained. The

C. A.
1932

BEAUMONT
v.
BEAUMONT.

application had been made in a suit which had abated, and on such an application no order could be obtained.

Leave to appeal was obtained, but at the time no appeal was brought from the decision, but the matter came before the President (Lord Merrivale) on June 6, 1932, on an original motion by the petitioner for an order that the sum in Court should be paid out to her or her solicitors or for directions as to ascertaining her right to the fund.

The President said that the order for security provided that the sum of 200*l.* should be paid into Court for securing the petitioner's costs of and incidental to the hearing. These costs would be paid out of the sum in Court if the judge at the trial thought it a proper case for the payment to the wife's solicitors of any costs and so ordered. The right of the wife to the fund in Court did not vest in her till that order was made at the trial. It was impossible to make any order as to costs of the trial before the hearing, and the purpose for which the money was brought into Court had failed. The motion must accordingly be dismissed.

The wife appealed. The appeal was heard on November 10, 1932.

At the hearing of this appeal the Court came to the conclusion that any order as to the wife's costs should preferably be made in the proceedings for judicial separation. The Court, therefore, extended the time for appeal from Bateson J. and treated an appeal from his decision as before it.

Singleton K.C. and *T. Bucknill* for the appellant. The wife is entitled to have her costs incurred since the setting down of the suit out of the fund in Court. The practice under which money is paid into Court as security for the wife's costs of and incidental to the hearing took the place of the payment by the husband of the wife's costs de die in diem. Apart from some special considerations, the wife when security has been given for her costs is entitled to have her costs paid by the husband if she has no separate estate, and whether she is petitioner or respondent: Rayden on Divorce, 2nd ed., p. 292. It is contended that when once a sum of money is in Court by way of security for the wife's costs the Court can always deal with it, whatever may happen to the suit. The order for security to cover the wife's costs " of and incidental to the hearing " is made under the Matrimonial Causes Rules, 1924, r. 91. These costs are in the discretion of the Court under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 50, sub-s. 1. The general rule used to be that the wife had a right to have her costs taxed and paid at all times: *Beevor* v. *Beevor*. (1) There is no provision in the rules for the case of the husband dying before the hearing, but a sum of money being lodged in Court for a particular purpose the Court must have power to deal with. The fact that the action has abated does not deprive the Court of its inherent jurisdiction to do what is right and proper in regard to the fund in Court: *Hall* v. *Hall* (2); *Cunningham* v. *Cunningham*. (3) In *Maconochie* v. *Maconochie* (4) there was no fund in Court, and the suit having abated it was held that the Court had no jurisdiction to make an order against the husband's representative for payment of the wife's costs. But in that case Shearman J. recognized that there was an exception to the rule that no application could be made in a suit after it had abated when there was a fund in Court.

In *Coleman* v. *Coleman* (5), also, there was no money in Court, although an order had been made for security, and the same distinction is drawn between that case and one like *Cunningham* v. *Cunningham* (3), where there was a fund in Court over which it was said that the Court had jurisdiction " as in rem." Down, therefore, to the decision in this case by Bateson J., the authorities in the Probate Division are nearly all in favour of this appeal. In *Brown* v. *Feeney* (6) a similar jurisdiction was exercised in the King's Bench Division. The whole principle seems to be that where there is a fund in Court the Court has power to do what is just in regard to it, and for the purpose to override any technical difficulties. There is, therefore, ample authority for the Court making the order asked for.

---

(1) (1809) 3 Ph. Ecc. 261.
(2) 3 Sw. & Tr. 390.
(3) 77 L. T. 405.
(4) [1916] P. 326.
(5) [1920] P. 71.
(6) [1906] 1 K. B. 563.

Clifford Mortimer and *Latey* for the respondent. There has here been a decision by Bateson J. in the suit that there was no jurisdiction to make an order in the suit for taxation and payment of the wife's costs. From that decision no appeal was brought; but in so far as *Hall* v. *Hall* (1) and *Cunningham* v. *Cunningham* (2) are authorities in the wife's favour, their effect is that there is jurisdiction in the abated suit to make the order and not on an original motion.

It is not disputed that the Court has jurisdiction to make orders as to a fund in Court by directing payment out to the person entitled to it, as in *Brown* v. *Feeney*. (3) That is where there is an accrued right, but the Court has no power, as ancillary to that jurisdiction, to make an order for taxation and payment of costs which could only be made by the judge at the hearing of a suit which has abated. What the Court is being asked to do is to say that, because it has jurisdiction over the fund, it can decide whether, if the action had proceeded to trial, the judge who heard the case would in the exercise of his discretion have ordered the husband to pay the wife's costs to the extent of the fund. Such an order cannot now be made.

[LAWRENCE L.J. That was what was done in *Hall* v. *Hall* (1) and *Cunningham* v. *Cunningham*. (2)]

Those cases cannot be supported in view of *Brydges* v. *Brydges* (4); *Maconochie* v. *Maconochie* (5); and *Coleman* v. *Coleman*. (6)

The history of the matter is that in the Ecclesiastical Courts the wife was a privileged litigant and, except when she had estate to her own use or the husband was a bankrupt, she was entitled to have her costs paid by him. The practice was to bring in her bill for taxation from day to day, and at some convenient date before the hearing to tax her costs of the hearing in anticipation and get payment of these costs.

(1) 3 Sw. & Tr. 390.
(2) 77 L. T. 405.
(3) [1906] 1 K. B. 563.
(4) [1909] P. 187.
(5) [1916] P. 326.
(6) [1920] P. 71.

C. A.
1932

BEAUMONT
v.
BEAUMONT.

That being very inconvenient a practice grew up of taxing costs at the end of each term, and of taxing the costs of the hearing at a convenient time and staying the hearing till they were paid. Originally, if the wife's costs were not taxed from day to day and the husband died, the right to payment of these costs was lost: *Cheale* v. *Cheale*. (1) It was seemingly after the passing of the Matrimonial Causes Act, 1857, that the practice grew up of ordering security for the wife's costs; but the explanation of the decision in *Hall* v. *Hall* (2) is that the old procedure of the Ecclesiastical Courts was still being followed. It is by rr. 158 and 159 of the Rules of 1865 (3) that the wife's absolute right to have her costs paid was cut down when she was an unsuccessful litigant and the matter left in the discretion of the Judge Ordinary at the hearing. The result is that the decision in *Hall* v. *Hall* (2) does not assist the wife's contention in the present case.

[LORD HANWORTH M.R. When there was no hearing, and in the absence of any rule dealing with the particular matter, would not the practice in the Ecclesiastical Courts prevail by virtue of s. 22 of the Act of 1857 ?]

It is contended not, having regard to the change of practice indicated by the 1865 Rules. The Court has no seisin of a suit after it has abated, but has inherent jurisdiction to direct payment out of money in Court to the person entitled to it. The authorities establish that when once a party to any proceeding dies there is no jurisdiction to make any order in it.

[LORD HANWORTH M.R. referred to *Dering* v. *Dering*. (4)]

In so far as that case treats the jurisdiction as continuing till the death is proved, it is submitted that it is wrong. The only other case which really supports the appellant's contention is *Cunningham* v. *Cunningham* (5), and there the point was never argued. *Brydges* v. *Brydges* (6) shows the limitation on the jurisdiction of the Court when a suit has abated. In *Maconochie* v. *Maconochie* (1) Shearman J. recognizes (2) the jurisdiction to deal with a fund in Court when a suit has abated, but not that any order can be made as to taxation and payment of costs. Further, in that case and in *Coleman* v. *Coleman* (3), no argument was heard in regard to the ambit of the exception where there is a fund in Court. The whole difficulty in the way of the wife is that the fund is not in Court to pay her costs but only to secure such costs of hers as the judge at the hearing may order to be paid by the husband.

---

(1) (1828) 1 Hag. Ecc. 374.

(2) 3 Sw. & Tr. 390.

(3) Rules and Regulations for Her Majesty's Court for Divorce and Matrimonial Causes, dated December 26, 1865, and set out in L. R. 1 P. & M. 752.

(4) (1868) L. R. 1 P. & M. 531.

(5) 77 L. T. 405.

(6) [1909] P. 187.

[No reply was called for.]

LORD HANWORTH M.R. This case raises an interesting point which has been well argued on both sides, and we are indebted to Mr. Mortimer for calling attention to the cases decided: [His Lordship then stated the facts.] Difficulties have occurred to the Court in dealing with the matter on an appeal from an order of the President on a motion before him independently of the suit commenced by the wife's petition. That difficulty can be removed, because it is possible to treat this appeal as an appeal from the order made by Bateson J. on a summons taken out in the petition proceedings, if we extend the time of appealing from his decision, as we have power to do. We have accordingly decided that the right mode of dealing with the substance of the matter is to extend the time for appealing from Bateson J.'s decision and to treat this appeal as an appeal from him.

It is said on behalf of the appellant that security was necessarily ordered to enable the wife to prosecute the suit and defend herself against the cross-claim, that she has since incurred costs with her solicitors, and that these solicitors have no means of being paid apart from the fund remaining in Court. Mr. Mortimer, who appears here on behalf of the husband's executor, has told us quite frankly that the estate of the husband is insolvent. He has also told us that the

(1) [1916] P. 326.
(2) [1916] P. 326, 328.
(3) [1920] P. 71.

C. A.
1932

BEAUMONT
v.
BEAUMONT.

Lord Hanworth
M.R.

wife has no separate estate or other means of satisfying her solicitors' claim for payment of her costs except the fund in Court. He admits that it is a case of hardship to the wife and her solicitors—to the wife in having incurred these expenses, and to the solicitors who, if he is right in his contention, are unable to obtain payment and are offered by him the cold comfort that it might be possible for them to proceed at common law against the wife, who has no money, and against the estate of the husband, which is insolvent. He admits the hardship, but says that there is a legal point on which he is entitled to rely which deprives the wife of the right to payment of her costs out of the fund in Court.

It is said, first of all, that the proceedings by petition were abated by the death of the respondent. On examining a number of cases I find it clear that until the death of a party has been brought to the knowledge of the Court it does not act on its own motion and remove the petition from the file. The death has to be proved. That is established by *Dering* v. *Dering*. (1) Moreover it is also correct to say that, although in divorce proceedings one of the spouses has died or the co-respondent has died so that the suit is no longer in existence as originally constituted, it must be treated as in being for certain purposes. Thus in *M.* v. *M. and A.* (2), a case in which the respondent, the wife, had died before decree nisi, it was still upheld as right for the petitioner to proceed against the co-respondent for damages, and although the suit for dissolution of marriage had abated it was to be treated as in being till the claim against the co-respondent had been determined. If the petition does not abate simpliciter on the death of the respondent, in the sense that there can be an application in order that the rights of the other parties may be determined, it would seem difficult to affirm the proposition of Mr. Mortimer that, as the action has abated in this case, no application can be made in it even in regard to the sum in Court.

Our attention has been called to the various rules on which the Court has acted in ordering a husband to provide means

(1) L. R. 1 P. & M. 531.

(2) (1910) 26 Times L. R. 305.

for the wife to carry on her suit, and in particular our attention was called to *Beevor* v. *Beevor* (1), where the matter is put as follows (2): "The general rule is, that the wife has a right to have her costs taxed at all times. The reason is because there are no other means of obtaining justice, since the marriage gives all the property to the husband." Reference has also been made to the old system, under which provision was made for the wife's costs by steps, and to the Rules of 1865 (3) which first modified that practice by rr. 158 and 159 so as to make it possible under these rules for security to be obtained by a wife who had entered an appearance. This she does under r. 158 by filing her bill of costs for taxation as against her husband, "and the registrar to whom such bill of costs is referred for taxation shall at the same time . . . . ascertain and report to the Court what is a sufficient sum of money to be paid into the Registry, or what is a sufficient security to be given by the husband to cover the costs of the wife, or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing or trial of the cause." Then r. 159 provided that when on the hearing or trial the decision was against the wife, "no costs of the wife of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for, and ordered to be allowed by the Judge Ordinary, at the time of such hearing or trial." It must, however, always be remembered that, except in cases fully covered by the rules, the power given by s. 22 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), to resort to the practice of the Ecclesiastical Courts still remains.

The order in the present case was one by which a sum of 200*l.* was ordered to be lodged in Court for the costs of the petitioner of and incidental to the costs of the hearing, and the word "incidental" is important and must connote those costs which would be incurred in ascertaining what evidence should be called and what documents ought to be placed in counsel's hands at the trial. Those were costs in addition to the costs of the hearing. Here the nature of the case was such that an order was made for further security to be provided, but the death of the husband took place before that order had been complied with, and it is impossible to make any order for costs against his executor who is not a party to the suit. Indeed, the very foundation of the suit has gone, as there is no longer a nexus between the two spouses seeing that the marriage has been dissolved by the husband's death. All the facts dwelt on in *Brydges* v. *Brydges* (1) are to be found in this case to the extent that it is impossible to make any order against the executor of the respondent who has passed away.

---

(1) 3 Ph. Ecc. 261.

(2) Ibid. 262.

(3) Rules and Regulations for Her Majesty's Court for Divorce and Matrimonial Causes, dated December 26, 1865, and set out in L. R. 1 P. & M. 752.

But that does not dispose of the case we have to deal with. It is a case in which there is a fund in Court which is provided as security for the wife's costs of and incidental to the trial, and justified her in proceeding with the preparation of the case for trial. In respect of such a fund, is it to be said that the Court can make no order at all, because the suit has abated ? I have commented on the use of the word "abated" in the course of the argument. It is really a metaphorical term and does not mean that the Court itself has taken the suit off the file. The suit is in reality sterilized by the death of one of the spouses. But is the Court not to have authority over the res under its jurisdiction ? Apart from cases in the Divorce Division it would seem that the Court has power to deal with such a fund. Thus, in *Brown* v. *Feeney* (2), money had been paid into Court by the defendant in satisfaction of a claim for damages in an action for libel without denying liability ; and after the death of the defendant his executors applied for an order that the money in Court should be paid out to them, as the action had been persisted in and the money had not been taken out by the plaintiff in settlement of his claim. But Vaughan Williams L.J. said (3) : "In my opinion when money is paid into Court the Court must have power to say what shall be done with it, though circumstances may have ousted the operation of the rules with regard to it." The other members of the Court, particularly Stirling L.J., dealt with the matter on the footing that the Court had inherent jurisdiction to deal with a sum remaining in its jurisdiction. In *Wright* v. *Mitchell* (1) a bill "was filed on behalf of the plaintiff and all other creditors of an intestate for an account, and to set aside the assignment of a lease by the intestate to two of the defendants in trust for a third. The tenants of the premises, being also made parties, paid the rent into Court. The bill having been dismissed for want of prosecution, a motion was afterwards made by the assignees of the lease, that the money in Court should be paid out to them. . . . . The Lord Chancellor said, the Court had jurisdiction to make an order for payment of the money out of Court," and ordered the money to be paid out. In other words, he treated the fund in Court as subject to its jurisdiction and the Court as competent to deal with it.

---

(1) [1909] P. 187.

(2) [1906] 1 K. B. 563.

(3) Ibid. 568.

I turn from these cases to those to which our attention was particularly called in the Divorce Division. In *Hall* v. *Hall* (2), "where the husband had paid a sum into the Registry to meet the wife's costs of the hearing of the petition, and had died shortly before the time appointed for the hearing, the Court made an order for the taxation of the costs incurred for the hearing by the wife's solicitors, and the payment to them of such taxed costs out of the fund in the Registry, with leave to the solicitors of the husband's executor to attend the taxation." That is obviously an application made in the petition, for Dr. Tristam asked the Court to dismiss the petition on the ground of the respondent's death and the Judge Ordinary said: "The solicitors for the respondent have a claim on the fund paid into the Registry for their costs. I will make an order for their costs to be taxed and paid out of the fund. There should be someone present at the taxation to protect the rights of the petitioner. The executor

(1) (1811) 18 Ves. 293.

(2) 3 Sw. & Tr. 390, 392.

is the proper person. The solicitors of the executor will therefore have leave to attend." In that case it is clear that the Judge Ordinary treated the application in the petition as a right one, and ordered taxation of the wife's costs and payment of such costs when taxed, these costs having been incurred before the hearing. Then, in *Cunningham* v. *Cunningham* (1), the wife had instituted proceedings for a divorce, and the husband having "died on the eve of the trial, an order for the wife's costs, limited to the amount lodged in Court, was afterwards made against the husband's executors, to whom leave was given to attend the taxation." It is plain that the petition was not forthwith dismissed but was adjourned, as counsel for the wife desired to consider the position, and when the case came on again an order was made on the application for taxation of the wife's costs and their payment out of the fund in Court. The order was made by Barnes J. It is said that the case was wrongly decided, but I should have the greatest reluctance so to hold having regard to the experienced judge who decided it; and from the reasoning of the cases so far referred to it would appear that the Court had power to deal with the sum brought into Court by the husband.

Two more cases must be referred to. In 1916 the case of *Maconochie* v. *Maconochie* (2) was decided. The decision was that "upon the death of a husband a party in a consolidated matrimonial suit, the causes of action being purely personal, the suit abates and the Divorce Division has no jurisdiction to entertain an application against the legal personal representative of the deceased husband in respect of taxation and payment of the wife's costs of suit, where no taxation or order for security of those costs had been applied for or made . . . . against the husband during his lifetime." In other words, where there is no res within the jurisdiction of the Court no order can be made, but Shearman J. made it plain that the position would have been different if there had been a fund in Court. He said (3): "These personal actions

(1) 77 L. T. 405. (2) [1916] P. 326. (3) Ibid. 328.

then having abated, no one can come to the Court and make an application in these actions. There is one exception to the rule, and that is where there are funds already in Court." Following that case the President, in *Coleman* v. *Coleman* (1), decided that "where in a suit brought by a husband for divorce an order has been made that the husband shall pay his wife's taxed costs and pay into Court, or give security for money towards her future costs, and the husband dies before the order has been obeyed, the Court has no jurisdiction to enforce payment against his executors. In such a case the suit is at an end and there is nothing in the Divorce Act or in the practice of the Court to enable it to be revived or the petitioner's executors to be brought before the Court." But the President said (2): "At the time of the husband's death there was not actually in existence any fund for payment of the wife's costs or any security for them, and although the wife had obtained her order she was in no better position than if the time for complying with it had not lapsed, because the course adopted had practically extended the time for compliance. It is urged that the case of *Cunningham* v. *Cunningham* (3) is an authority by analogy for enforcing the order after the death of the husband. But in that case the money was in Court, and therefore the Court had jurisdiction over it, as in rem."

The authority of all the cases I have referred to points to the conclusion that where there is a res in Court, there is jurisdiction to deal with it notwithstanding the death of a party to the suit. In these circumstances it appears to us that the requisite order should be made on appeal from Bateson J., and that the order in that appeal should be that the wife's costs incurred down to the date of the husband's death should be taxed. At that taxation it will be possible to decide whether costs have been properly or improperly incurred, and the deceased husband's executor will be at liberty to attend the taxation. There will also be an order for payment of the amount of the costs properly incurred, when

(1) [1920] P. 71.
(2) [1920] P. 74.
(3) 77 L. T. 405.

they have been ascertained, out of the sum in Court, and that the balance, if any, shall be paid to the husband's executors. I desire to repeat that we are only dealing by our decision with a case where there is a res in Court, and to make it clear that we are not challenging cases where it has been definitely decided that no order can be made against executors of a deceased husband to fulfil an order made against the husband for payment of money into Court, by way of security for the wife's costs, or themselves to secure those costs. What we are dealing with is a case where there is a fund in Court which is available to answer the wife's costs.

LAWRENCE L.J. I agree. Mr. Mortimer does not seriously dispute that notwithstanding the abatement of the suit the Court has power to order payment out of the fund in Court to the person primarily entitled to it; but he resists an order in this case, because under the rules the money in Court is security only for such costs as have been ordered in the suit to be paid by the husband to the wife, and he says that, as the husband has died the suit has abated, no order can now be made either on the husband or on his executor to pay any costs.

It is true that under the rules the security which has to be given is only for the wife's costs of and incidental to the hearing, and that payment thereout of those costs is subject to the judge making an order at the hearing that they should be paid by the husband; further, that it is in the discretion of the judge in a proper case not to make any order on the husband for the payment of the wife's costs. These considerations, however, are in my opinion no bar to an application by the wife for payment of the costs properly incurred by her in the suit in the circumstances of this case. The costs incidental to the hearing include costs incurred in preparing for the hearing, and such costs are admittedly costs which the judge at the hearing would usually order the husband to pay. In these circumstances there is no reason why these costs should not be paid to the wife although owing to the husband's death the suit was not brought to a hearing. The rules do not provide what is to be done with the security where the proceedings are abated or where the petition is withdrawn before the hearing, but I think the same reasoning applies to such cases as was applied by the Court of Appeal in *Brown* v. *Feeney* (1), where Vaughan Williams L.J. said (2): "I do not think that that power"—that is, the power to order money in Court to be paid out to any person to whom the Court might think it ought properly to be paid—"is one which can only necessarily be exercised under the rules. In my opinion when money is paid into Court the Court must have power to say what shall be done with it, though circumstances may have ousted the operation of the rules with regard to it."

As regards the exercise of the jurisdiction to order taxation of costs and payment out, I think that this jurisdiction should preferably be exercised in the suit in which the money has been paid into Court. It seems to me unnecessary and inexpedient to commence independent proceedings for the taxation of costs incurred in another proceeding. In my opinion this suit is not abated for the purpose of the distribution of the fund in Court, and in so holding I found myself on *Hall* v. *Hall* (3) and *Cunningham* v. *Cunningham* (4), and on what was said by Shearman J. in *Maconochie* v. *Maconochie* (5)—namely: "When one of these parties dies the action abates; it comes to an end; it is dead and done with. These personal actions then having abated, no one can come to the Court and make an application in these actions. There is one exception to the rule, and that is where there are funds already in Court." Mr. Mortimer was perfectly right in saying that no order could be made on the husband's executor to pay the wife's costs. He is not a party to the suit and no order can be made in it against him. But after the husband's death the wife remains a party to the suit so far as that suit is not at an end, and she is the proper person to apply for the distribution of the fund in Court. The Court ought not, however, to distribute the fund without notice to the husband's executor to whom it belongs, subject to the wife's claim, and, of course, the Court should allow the executor to attend the taxation of the wife's costs.

---

(1) [1906] 1 K. B. 563.
(2) Ibid. 568.
(3) 3 Sw. & Tr. 390.
(4) 77 L. T. 405.
(5) [1916] P. 326, 328.

In my opinion, for the reasons stated, the Court should give the appellant an extension of time for appealing from the decision of Bateson J., and ought to deal with the matter on the footing that a notice of appeal from that order has been served and is now before the Court.

ROMER L.J. I agree. It was settled long ago in the Court of Chancery, at any rate, that when a fund had been paid into Court in the course of proceedings there was jurisdiction to deal with the fund after the suit had abated. That jurisdiction was exercised in *Wright* v. *Mitchell* (1) and earlier in *Roundell* v. *Currer* (2); and in both cases the fund was directed to be paid to the persons who showed that they had a clear right to it. In *Brown* v. *Feeney* (3) that same jurisdiction was exercised in a case in the King's Bench Division, where, after the action had abated by reason of the death of the defendant, the Court directed payment out to the plaintiff of a sum of money paid into Court in the action, as it was satisfied that if the action had gone on to trial the plaintiff would have established a right to it.

In the present case we are asked to exercise a similar jurisdiction and to order payment of the wife's costs up to the date of the husband's death out of the fund in Court. It is recognized and admitted that having regard to the husband's death it is not open to the Court in these proceedings to make an order against his executors for payment of any costs or any other sum of money; and the distinction is not very apparent between making such an order and ordering payment of the costs out of a fund in Court which, but for the wife's claim, would

---

(1) 18 Ves. 293.

(2) (1801) 6 Ves. 250.

(3) [1906] 1 K. B. 563.

C. A.
1932

BEAUMONT
v.
BEAUMONT.

Lawrence L.J

belong to the executor. But such an order was made in *Hall* v. *Hall* (1) and *Cunningham* v. *Cunningham* (2), and the authority of those cases was recognized in 1916 by Shearman J. in *Maconochie* v. *Maconochie* (3), and in 1920 by the President in *Coleman* v. *Coleman*. (4)

In view of these authorities I am not prepared to say that such an order as is asked for here ought not to be made; and as nothing has been said to create the slightest doubt in my mind that the wife would have obtained an order at the trial against the husband for payment of these costs, whatever the result of her petition might have been, I think it is right that we should order these costs to be paid out of the fund in Court.

Appeal allowed.

Solicitors: *Mackrell, Ward & Knight; Scott & Son.*

(1) 3 Sw. & Tr. 390.
(2) 77 L. T. 405.
(3) [1916] P. 326, 328.
(4) [1920] P. 71.

H. C. G.

1932
Oct. 17, 31.

THE LALANDIA.

Shipping—Practice—Defendants a foreign Corporation—Service of Writ on English Agents—Tests of carrying on Business within Jurisdiction—Writ and Service set aside.

The plaintiffs, the owners of a vessel damaged in collision with a vessel owned by the defendants, a foreign corporation, served a writ upon a member of an English firm, E. M. & Co., who acted as the defendants' agents. The writ was served at E. M. & Co.'s London offices. The defendants moved to set aside the writ and service on the ground that they were not resident within the jurisdiction.

It appeared that E. M. & Co. were one of the defendants' agents in this country for the booking of freight, issue of passenger tickets, and the ordinary purposes for which ship's brokers are employed. The only remuneration received by them was the customary agents' commission, and they had no concern with the management of the defendant corporation. The only name appearing on the door of E. M. & Co.'s offices was their own name, but upon the window of the ground floor their name was exhibited as agents for the defendant corporation together with the names of other foreign shipping companies for whom E. M. & Co. acted :—

Held, applying the tests stated by Buckley L.J. in *Thames and Mersey Marine Insurance Co.* v. *Società di Navigazione a Vapore del Lloyd Austriaco* (1914) 12 Asp. M. L. C. 491 and *Okura & Co.* v. *Forsbacka Jernverks A/B* [1914] 1 K. B. 715, that E. M. & Co. were a firm who "sold" and did not "make" contracts on behalf of the defendants, and that the defendants did their business in this country "through" E. M. & Co. and not "by" them; that the defendants, accordingly, were not resident within the jurisdiction and that the writ and service must be set aside.

Motion by the defendants to set aside a writ and the service thereof.

The plaintiffs were the owners of the motor vessel *Henry Stanley*; the defendants, the owners of the motor vessel *Lalandia*, were described as "the East Asiatic Company, Ld. (a foreign corporation), of 13 Fenchurch Avenue in the City of London." The motion was made on the ground that the address of the East Asiatic Company was at Copenhagen and not in the City of London, and that Myles V. B. McGrath, a member of the firm of Escombe, McGrath & Co., on whom the writ was served, was not a head officer or clerk of the defendants, and that the defendants did not reside or carry on business within the United Kingdom.

The facts are fully stated in the two affidavits set out in the judgment.

H. G. Willmer for the defendants in support of the motion.

G. St. C. Pilcher for the plaintiffs, contra.

[The arguments turned for the most part on the differentiation of the facts in the reported cases, and are fully stated in the judgment. In the course of the arguments it was stated by counsel for the plaintiffs that the name of the East Asiatic Company appeared in the London Telephone Directory, the address given being 13 Fenchurch Avenue, with no mention under that heading of Escombe, McGrath & Co. In addition to the cases cited in the judgment reference was made to *Walter Nutter & Co.* v. *Messageries Maritimes de France* (1); *La Bourgogne* (2); *Allison* v. *Independent Press Cable Association of Australasia* (3); and *The W. A. Sholten.* (4)]

Cur. adv. vult.

1932. Oct. 31. Langton J. This is a motion to set aside a writ and the service of the writ on the ground that the defendants, the East Asiatic Company, Ld., are not resident within the jurisdiction and that the service that has been made upon Escombe, McGrath & Co. is not therefore a good service.

The case is not a difficult example of its class, and I have not felt any great doubt about it. It has been clearly argued on both sides, but the evidence has been from one side only. That does not, however, mean to say that the evidence was all one way. As Mr. Pilcher pointed out, there were many things which pointed in his favour, and that made one feel that the evidence was all the more candid and reliable for the purpose of this Court. The evidence was in two affidavits, the first of which was by Mr. M. V. B. McGrath, a member of the firm of Escombe, McGrath & Co., of 13 Fenchurch Avenue, in the City of London.

---

(1) (1885) 54 L. J. (Q. B.) 527.

(2) [1899] P. 1; [1899] A. C. 431.

(3) (1911) 28 Times L. R. 128.

(4) (1887) 13 P. D. 8.

Mr. McGrath says that "the East Asiatic Company, the defendants in this action, are a foreign corporation carrying on business at Holbergsgade 2, Copenhagen. They have no residence, office or place of business registered or otherwise at 13 Fenchurch Avenue. The firm of Escombe, McGrath & Co. are ship and insurance brokers and carry on the business of freight and passenger agents at 13 Fenchurch Avenue. In the course of the said business my firm act and have acted for about thirty years as agents for the East Asiatic Company. They also act as freight and passenger agents for several other foreign steamship companies. Beyond the ordinary duties of shipbrokers, such as the booking of freight and the issue of passenger tickets, my firm transacts no business and has no authority to transact business or enter into contracts on behalf of the East Asiatic Company or of any of the other companies hereinbefore referred to. The rates of freight and the passenger fares are fixed by the East Asiatic Company. Bills of lading and passenger tickets are supplied to my firm on forms prepared by the East Asiatic Company and printed in Denmark. Such bills of lading and passenger tickets are invariably signed by my firm as agents only and they constitute or evidence contracts only with the East Asiatic Company. The terms of the bills of lading specifically provide that questions arising thereunder shall be governed by the law of Denmark and shall be decided in Copenhagen. . . . . The name of my firm . . . . is the only name appearing on the doors of the firm's offices at Fenchurch Avenue, but upon the windows of the ground floor the firm's name is exhibited there as agents for the East Asiatic Company, Ld., together with the names of other foreign shipping companies. Upon a window of the basement the name of the East Asiatic Company is exhibited together with a copy of that company's house flag, and upon the adjoining windows are the names of other foreign steamship companies for whom my firm act as agents. The letter paper used by my firm when transacting any agency business states thereon the names of the various shipping companies

1932

The Lalandia.

Langton J.

for whom they are agents. Save as hereinbefore set out my firm are in no way connected with the East Asiatic Company. They have no concern with the management of that company nor any financial interest or share or holding therein. The only remuneration received by my firm from the East Asiatic Company is the customary agent's commission on freights and passage money received and brokerage. The East Asiatic Company is in no way concerned in the management of my firm's office. The rent of the office is paid by my firm . . . . and the staff employed in the office are all the servants of my firm. On August 30, 1932, I was handed a copy of the writ of summons in this action by a representative of Messrs. Lawrence Jones & Co., the plaintiffs' solicitors, who stated that the writ was served upon me as representing the East Asiatic Company. I am advised and verily believe that neither I nor my firm is the representative of the East Asiatic Company, Ld., in this country for the purpose of the service of legal process. Neither I nor my firm is the head officer or clerk of the East Asiatic Company, nor is any head officer or clerk of that company resident at 13 Fenchurch Avenue. I respectfully submit that the East Asiatic Company does not reside or carry on business at 13 Fenchurch Avenue and that the service of the writ upon me was irregular and should be set aside. I further submit that the writ was in itself bad in that the address of the Asiatic Company was not correctly stated therein. The address stated namely 13 Fenchurch Avenue, is not the address of the East Asiatic Company but of the firm of Escombe, McGrath & Co."

This affidavit is supplemented by an affidavit of Mr. Christian Frederik Joachim Schmiegelow, of Holbergsgade 2, Copenhagen, a managing director of the East Asiatic Company, Ld. He says: "The East Asiatic Company, Ld., is a corporation registered under the laws of the Kingdom of Denmark and carries on business as shipowners, being the owners of the motor vessel *Lalandia*. . . . . Branch offices are maintained by the company at Singapore and Bangkok. At a number of ports and places . . . . the company has established its own agencies. At other ports in the world the company does not have an agency of its own but employs a local firm or company to act as its agents and to transact agency business on its behalf. The company employs the firm of Escombe, McGrath & Co. to act as one of its agents in the United Kingdom." That firm "is one of the company's agents for the booking of freight, the issue of passenger tickets and for the ordinary purposes for which ships' brokers are normally employed. For the services rendered by them the said firm receives from the company only the customary agent's commission and brokerage. Save as aforesaid the East Asiatic Company is in no way connected with the said firm. It is in no way concerned with the management of the said firm or with the maintenance of the said firm's offices. I have read a copy of the affidavit sworn by Mr. McGrath and confirm what is therein stated with regard to the relationship between the East Asiatic Company and Escombe, McGrath & Co. The only business transacted in the United Kingdom on behalf of the East Asiatic Company is the agency business transacted as set out in the affidavit. The East Asiatic Company has no residence, office or place of business of its own in the United Kingdom. . . . . It has no registered address anywhere within the United Kingdom such as is provided for by s. 344 of the Companies Act, 1929. It has no employees or servants of its own resident anywhere within the United Kingdom. . . . . The East Asiatic Company . . . . has never represented that it resides or carries on business in the United Kingdom or that the offices of Escombe, McGrath & Co. is its own office. Nor has the company ever held out that Escombe, McGrath & Co. are its representatives except for the purposes described in this affidavit. . . . . I submit that the writ in this action is bad, and that the service upon Mr. Myles McGrath was irregular and should be set aside, because (*a*) Mr. McGrath is not a head officer or clerk of the East Asiatic Company, Ld., and (*b*) the company does not reside or carry on business within the United Kingdom."

1932

THE LALANDIA.

Langton J.

It is interesting to note, as is shown by the bill of lading exhibited by the East Asiatic Company, that that company has offices of three kinds. It has its own head offices and branch offices. It has its head office at Copenhagen with branch offices at Singapore and Bangkok and a second class of agency in various other parts of the world. Then it has a third class of agents, and it is under this third class that Escombe, McGrath & Co. rank. They are agents for London, Middlesbrough, and Manchester.

That is the evidence put forward by these two affidavits, and it is on that evidence that this case falls to be decided. It appears from the result of all the cases of this class that each case depends upon questions of fact to be decided upon the evidence. When one comes to look at the various cases quoted for guidance one is a little puzzled, because they have provided somewhat varied tests. There does not appear to be any guiding or acid test.

The cases fall into two classes—cases of ships' agents, as here, and cases of agents other than ships' agents. Taking the second class first, I can get very little guidance at all from them. There are two leading cases on the matter: *Saccharin Corporation* v. *Chemische Fabrik von Heyden A/G* (1) and *Okura & Co.* v. *Forsbacka Jernverks A/B.* (2) Neither of these cases afford me much guidance for the purposes of the present case, because it seems to me that each of them falls very clearly and decisively upon one side or the other of the dividing line. In the *Saccharin Corporation* case (1) the defendants were carrying on business through an agent at the agent's office while the defendants were resident out of the jurisdiction, but I feel very little surprise at the decision because, when one comes to look at the agent, we find that he was a gentleman who had no other business at all except the agency for this company and one other, and he had very considerable discretion, as far as one can see, in dealing with contracts for the company for whom he was acting as agent. Therefore it was not surprising in the circumstances to find that Fletcher Moulton and Farwell L.JJ. came

(1) [1911] 2 K. B. 516. (2) [1914] 1 K. B. 715.

to the unhesitating view that the company was resident in this country through the agent. Vaughan Williams L.J. took a somewhat differing view, but it appears to me as a strong case in favour of the majority decision, and Vaughan Williams L.J. did not really differ from the others. But it is a simple case and does not give me much assistance. In the *Okura* case (1) the facts were strongly the other way, and the decision not unnaturally went the other way, for the company that was alleged to be acting as agents had no kind of authority to enter into any contract on behalf of the defendants, but were merely a kind of advance agents who obtained orders and submitted them to the defendants for approval. In the words of Lord Wrenbury (then Buckley L.J.) the agents acted only as agents in the manner indicated, and they had no control over the way the defendants did their business and had no general authority from them with regard to making contracts, and so it would have been difficult to say that the foreign corporation in that case was either "resident," which is the word of the rule, or "here," as is sometimes said in argument as a way of expressing that the company is resident within the rule. Again, to pursue Lord Wrenbury who made this subject particularly his own, we have to see whether the foreign corporation are doing their business here "by a person or through a person." That is one of the tests that he applies to this class of case—that they should be doing the business in order to be resident "by a person and not through a person." Then Lord Phillimore says: "The important distinction between the two cases is that in the *Saccharin Corporation* case (2) the agent in London had authority to enter into contracts on behalf of the defendants without submitting the orders to them for their approval; whereas in the present case the agents have not that authority, their duty being merely to submit the orders to the defendants; and until they have signified their approval no contract can be entered into." There again Lord Phillimore seems to be adopting something of the same test as Lord Wrenbury and

(1) [1914] 1 K. B. 715, 724. (2) [1911] 2 K. B. 516.

1932

THE LALANDIA.

Langton J.

to say that in that particular case the agent was not a company whose work could be said to bring the foreign company within the ambit of the rule.

Now, passing from this class of case to the shipping agent class, we have first of all a case which seems to me to be helpful and authoritative and upon which I can rely, and that is *The Princesse Clémentine.* (1) In that case the agents, Barr, Moering & Co., had offices in Fenchurch Street, which they had taken in their own name and for which they paid the rent. They were agents for the Société John Cockerill, a foreign corporation, and the writ in the action which was brought against the Société was served upon Mr. Knight, an officer of the agent, at the offices in Fenchurch Street, as being the offices of the foreign corporation. Gorell Barnes J., in dealing with that case, says this: "In a popular sense, no doubt, the business of the defendant corporation is carried on by the corporation in England, but I do not think that this is so in the eye of the law. It seems to me that the business carried on in this country is that of an agency for the defendant corporation . . . . it follows, therefore, that the person upon whom the service was made was the servant of that firm, and not the servant of the corporation." In that case also it appears that the rent of the offices was not charged against the defendants, but the agent received a commission on freights and was paid a fixed annual allowance for doing its business, and if anything it seems to me that the case was a little stronger against the defendants than the case with which I am now dealing. The agents were paid a fixed annual allowance for doing the defendants' business, and I cannot see that that is the case here. I think they are only paid the ordinary brokers' commission. However that may be, the case I have mentioned is nearer to this one than any I have been able to find, and Lord Gorell seems to have dealt with the matter with no doubt at all.

The main difficulty of this class of case is to be found in one example much relied upon by Mr. Pilcher: *The Thames and Mersey Marine Insurance Company* v. *Società di Naviga-*

(1) [1897] P. 18, 21.

zione a Vapore del Lloyd Austriaco. (1) This action was a case that went to the Court of Appeal, and the judgment was given in a written form by Lord Wrenbury (then Buckley L.J.), who made, as ever, some very lucid observations, and I think made an earnest attempt to deal with the circumstances from a general point of view and to lay down some guidance for the future. The test to be found in his judgment is this : "The test in each case is to find the answer to the following question : Does the agent in carrying on the foreign corporation's business make a contract for the foreign corporation, or does the agent in carrying on the agent's own business, sell a contract with the foreign corporation ? In the former case the corporation is and in the latter it is not carrying on business at that place. Marcus Samuel & Co. do the former ; Thomas Cook & Son do the latter." Mr. Willmer pointed out that I must take that test in conjunction with the sentence which precedes it, in which it is seen that the Lord Justice was then dealing with a certain limited class, shipping companies undoubtedly being one, but that he was not attempting to lay down a test for every sort or kind of foreign corporation. He was not purporting, Mr. Willmer said, to lay down something which was to be applied universally and in all circumstances, and one could easily bring the wrong illustration, because the test was not meant to apply universally. Mr. Pilcher relied upon that case, because he said that Marcus Samuel & Co. were acting in precisely the same way in that case as Escombe, McGrath & Co. were acting here, and there is a good deal to be said for his presentation of the facts. The antithesis noted by Lord Wrenbury is between Marcus Samuel & Co. and Thomas Cook & Son, and it is based upon this illustration. Marcus Samuel & Co. were the general agents of the company in London, whereas Thomas Cook & Son were only one of several ticket agents who had the right to sell tickets for the shipping line. Therefore Lord Wrenbury pointed out that in the one case there was a corporation that could be called agents whereas the other was a mere ticket agency. But

---

(1) 12 Asp. M. L. C. 491.

1932

THE LALANDIA.

Langton J.

it is to be noted that he says that the antithesis is between an agent who makes a contract and an agent who sells a contract. Thomas Cook & Son fell under the latter class, because they only sold tickets or contracts for the foreign company. But it is a little difficult to follow what exactly Marcus Samuel & Co. did. According to the recital of the facts they issued tickets and made contracts for the carriage of passengers and luggage and goods and booked freight for goods in the defendants' steamships. So far they did nothing much more than Thomas Cook & Son, except that they booked freight for goods, whereas there is nothing to show that Thomas Cook & Son had any activities in that direction. Then the recital goes on to state that, besides receiving commission for freight arranged and tickets supplied, Marcus Samuel & Co. received a small sum for postage and a substantial payment per annum for rent, clerks and sundry office expenses, and therefore it seems to me that they differed largely from the position of Thomas Cook & Son, and also from the position of Escombe, McGrath & Co. in the present case.

It may not be an acid test or an actual test that Lord Wrenbury has laid down as to the making and selling of contracts, but it is important that we find Marcus Samuel & Co. receive a sum per annum for rent and salaries of clerks and expenses, whereas Escombe, McGrath & Co. receive nothing of the kind and are merely brokers carrying on their own business and receiving a commission for work done from the East Asiatic Company and other companies. To pursue the *Thames and Mersey* case (1), the recital goes on to say: "There was a notice outside the premises that they were agents for the defendants, and there were two special desks on the ground floor of these premises allotted to the defendants' business," and that is foreign to the present circumstances. "In practice the agents were often allotted a limited number of berths on a steamer, but apart from this they could not allot berths and book any freight without telegraphing to the defendants." There they are not very different from

(1) 12 Asp. M. L. C. 491.

the position of Escombe, McGrath & Co. In the *Thames and Mersey* case (1) special notepaper and forms were used by the agent when transacting the defendants' business, but I do not find that in this case.

Applying that case as best I can to the present circumstances, and agreeing as I do that there are many general features of similarity, I think there are many features of differentiation, and when one comes to apply the test of Lord Wrenbury—making or selling contracts—it appears to me that Escombe, McGrath & Co. are people who sell and do not make contracts on behalf of this company. It may be, of course, that the recital of facts in the *Thames and Mersey* case (1) is somewhat short, and the apparent discrepancy between Lord Wrenbury's test and the facts upon which he based it may be found in the omissions. I notice, for example, that in his judgment Lord Wrenbury says that the letter of appointment of October 29, 1904, constituted the firm general agents for the company at 5 per cent. commission on tickets sold and 2 per cent. on tickets sold by other agencies, and that a sum of 480*l.* a year was paid for rent, clerks and office expenses. Therefore there was a good deal of evidence in the *Thames and Mersey* case (1), which differed somewhat widely from the evidence in this case.

Now taking these various tests, the test of making or selling contracts and the test of Lord Wrenbury in the *Okura* case (2) of whether the defendants are acting "by" a person or "through" a person, and the value to be attached to whether the rent is paid by the foreign corporation or whether the agent in this country has the right or not to make any independent contract and has any discretion of his own—applying all these various tests as best I can to the present case, it seems to me that Escombe, McGrath & Co. fall upon the side of the line of agents who carry on their own business and not the business of the foreign corporation. I do not pretend that any of the cases are overwhelmingly clear, and one has to do the best one can with

(1) 12 Asp. M. L. C. 491.

(2) [1914] 1 K. B. 715.

the facts as they are, but, so far as I can see the dividing line in cases of this class, I am clear that Escombe, McGrath & Co. fall upon the side of people who have a wide business of their own and who, in the course of it, transact business as agents for a number of foreign firms of which the East Asiatic Company are one. I was informed in the course of the argument that the East Asiatic Company provided a large proportion of these agents' business or a large proportion of their foreign steamship business. That may be the case, but I cannot speculate upon a matter upon which I have no evidence on oath, nor am I certain that it is a circumstance that ought to weigh strongly. I have to make up my mind whether the foreign corporation is really here, in the sense that it has somebody doing its business here who is not doing primarily his own business, and I think Escombe, McGrath & Co. on the evidence are primarily doing their own business and only in a secondary sense doing the business of the East Asiatic Company. Therefore the motion will succeed and the writ and the service of the writ will be set aside with costs.

Solicitors for the plaintiffs: *Lawrence Jones & Co.*
Solicitors for the defendants: *Thomas Cooper & Co.*

E. C. M. T.

1932
Dec. 13, 14,
15.

H. M. SUBMARINE RAINBOW.

Shipping—Collision—Portland Harbour—Vessels "about to enter" from Seaward—Order in Council as to the Dockyard Port of Portland, Sch. II., r. 5 (1931, *No.* 176).

Rule 5 of a schedule to an Order in Council relating to the Port of Portland (1931, No. 176) provides that "When any vessel or vessels are about to enter from seaward any of the channels between the breakwaters, no vessel proceeding outward by the same channel shall enter this said channel until the before mentioned vessel, or vessels, shall have passed in."

A collision between the *R.*, an outward bound submarine in command of the defendant, and the plaintiffs' vessel *P.* inward bound, took place in the North Ship Channel entrance to Portland Harbour, slightly to the southward of mid-channel and about 200 to 300 feet outside of a line drawn between the breakwaters. It was argued for the defendant that r. 5 did not apply, inasmuch as a vessel "about to enter from seaward" one of the channels meant a vessel going to enter the water which might reasonably be taken to be included in the word "channels"; and that the *P.* was never in a position of being "about to enter," which implied that she must so approach as to indicate clearly her intention to enter, whereas, instead of "shaping up" at a proper distance to enter the channel, she was cutting the corner and then had to make a turn of five or six points:—

Held, that the collision took place in what might fairly be called one of "the channels between the breakwaters"; that taking r. 5 as a whole, its purport was not to lay down how vessels should or should not approach the harbour, but to lay down in clear language that the outgoing vessel should be the give-way vessel; and that accordingly the *R.* was to blame.

Held further, that the vessel with the right of way was not in the position of a "keep course and speed" vessel under the crossing rule; that the *P.* having a bad look-out, and, considering the fine angle at which she was approaching the breakwater, too high a rate of speed, was also to blame.

Both vessels accordingly held to blame in the proportions of two-thirds to the *R.* and one-third to the *P.*

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the paddle steamer *Premier*; the defendant was Lt.-Commander Thomas Yeoman, commanding H. M. Submarine *Rainbow.* The collision took place in the North Ship Channel entrance to Portland Harbour on the afternoon of June 28, 1932, in fine, clear weather.

According to the statement of claim, the *Premier*, bound from Weymouth to Portland Harbour with 150 passengers and a crew of nine hands, was drawing towards the southern end of the northern breakwater, steering S. by E. magnetic and making about 8 knots at full speed, when those on board her observed over the breakwater, distant from one to two cables and bearing a little before the starboard beam, the top of the mast of a submarine from which no warning signal had been heard, and apparently making for the North Ship Channel entrance at high speed. The engines were at once stopped and put full speed astern, the helm put hard-a-starboard, and the appropriate blasts sounded, but the submarine shortly afterwards came into view clear of the northern breakwater and continuing on struck the starboard bow of the *Premier*, doing considerable damage.

The plaintiffs alleged (inter alia) that those on the *Rainbow* failed to comply with r. 5 of the Second Schedule of the Order in Council as to the Dockyard Port of Portland, dated March 20, 1931. The rule is set out in the headnote and also in the judgment.

According to the defence, the *Rainbow*, a twin-screw submarine, 287 feet in length, was approaching the North Ship Channel to proceed to sea, and with her engines working up to half speed ahead was making about 5 knots through the water and increasing, when the mast and upper part of the funnel of a vessel, which proved to be the *Premier*, were observed over the top of the breakwater. It did not occur to those on board the submarine that the *Premier* was coming in, but after an interval her bearing was observed not to be altering, and a signal of one long blast was sounded on the siren of the *Rainbow*. Shortly afterwards the stem of the *Premier* came into view clear of "C" breakwater head, and she was observed to be crossing the course of the *Rainbow* from port to starboard. The engines were at once put full speed astern, the helm hard-a-ported and three short blasts sounded on the whistle, but shortly afterwards the collision occurred.

The defendant alleged (inter alia) that the *Premier* approached the entrance to the North Ship Channel in an improper manner and at excessive speed.

E. A. Digby K.C. and *R. F. Hayward* for the plaintiffs.

Alfred Bucknill K.C. and *Kenneth Carpmael* for the defendant.

[In answer to the plaintiffs' contention that under r. 5 they had the right of way, it was argued for the defendant that a vessel "about to enter" one of the channels from seaward must indicate that she is intending to enter, and the only way her intention can be made manifest is for her to shape such a course that a vessel proceeding outwards can conclude that the other vessel is going to enter the channel. The *Premier*, it was contended, was cutting the corner and had to make an alteration of five or six points to get into the channel between the breakwaters, and a vessel has no right to enter a narrow channel in that way: *The Kaiser Wilhelm der Grosse* (1); *The Harvest.* (2) Rule 5, therefore, did not apply, but even if it was held to be applicable, the *Premier* was still to blame for bad look-out, excessive speed, and approaching the entrance in an unseamanlike manner.]

LANGTON J. This case arises out of a collision which took place on June 28, 1932, between a very ancient paddle steamer, constructed before 1850, the *Premier*, and H. M. Submarine *Rainbow*.

That a collision of this sort should have occurred in broad daylight, in a place where one would imagine every one would be specially on the alert, is a circumstance which excites some surprise, and the first matter for determination is as to the rules applicable to the place where the collision occurred. [His Lordship dealt in detail with the evidence as to the place of collision, and said that he thought it happened in the North Ship Channel entrance to Portland Harbour, "slightly to the southward of mid-channel about 200 to 300 feet outside of a line drawn between the breakwaters, if heads 'B' and 'C' are taken as the terminals of the line."]

Having arrived at this determination I have to see what are the rules applicable. Under the Dockyard Ports

(1) [1907] P. 36.

(2) (1886) 11 P. D. 14, 90.

Regulation Act, 1865, Orders in Council are from time to time made, and in 1931 an Order, No. 176, was issued, laying down in a schedule certain rules with regard to the navigation of the Dockyard Port. Summarizing the rules applicable to this case, No. 1 provides that "all vessels shall observe the steering and sailing rules set forth in the Regulations for Preventing Collisions at Sea, except so far as they are affected by the regulations hereinafter contained." It is important, therefore, to notice that although the Sea Regulations are to a certain extent superseded, they are only superseded to the extent mentioned in the Order and are otherwise preserved in force. Rule 5 of the Dockyard Regulations is in these terms—again citing only the material part: "When any vessel or vessels are about to enter from seaward any of the channels between the breakwaters, any vessel proceeding outward by the same channel shall not enter the same channel until the before mentioned vessel, or vessels, shall have passed in." There are also a series of signals which have to be used and displayed if one of H. M. ships desires to take advantage of a priority which is granted to H. M. ships to pass out ahead of other vessels. It suffices to say that in this case the submarine was displaying no such signals.

I have, therefore, to construe r. 5 in connection with the ordinary Rules for Preventing Collisions at Sea, and, as laid down by the Order in Council, it seems to me that r. 5 is an overriding rule, assuming of course that it applies at all in the circumstances of this case.

The *Premier* was coming from Weymouth on a course of S. by E. with some 150 passengers and seeking to enter the North Ship Channel. The *Rainbow*, which had been at anchor in the north-west corner of the harbour, had left her anchorage and had got upon a course of 90 degrees, true, to go out of the same channel. In these circumstances the vessels are found in collision at the place I have indicated, a large hole being made in the starboard side of the *Premier* commencing some 25 feet from her stem. Very fortunately no lives were lost, but as the hole was only some

5 or 6 inches forward of the only bulkhead with which this old vessel was provided, it is apparent that the margin of safety was small. The *Premier* makes this trip two or three times a day in the summer-time, laden with passengers, and if, therefore, there is anything in the way in which she carries out her work which calls for criticism, or if there is any doubt as to what rules apply in the user of this channel, it is of the highest importance that that doubt should be removed and that her duty should be carried out differently.

There is a great conflict of evidence, but broadly the cases are these. The plaintiffs say that the *Premier* came down as she always came; that she had the right of way; that she came down to within 2 to 2½ ship's lengths of "C" head—the head of the northern arm of the breakwater—and that she was about to alter her helm, as she always did, to make her turn to enter the harbour. The turn which she would have to make coming upon that course was something between 5 and 6 points.

The case for the *Rainbow* is that she was going out to practise torpedo firing and that a vessel's mast was seen over the northern arm of the breakwater, that it was not thought she was coming in, but that she was going either to the north-eastern breakwater or to the East Ship Channel, or possibly to sea, so the *Rainbow* held on her way. A long warning blast was blown and then, when to the surprise of those on board the *Rainbow* it was seen that the *Premier* was coming in, three short blasts were blown, the engines were put full speed astern, and afterwards the helm was put hard-a-port to try to avoid the collision. The officer in charge of the *Rainbow* put his case as high as this. He claimed that the *Premier* had no right to come into the harbour in the way she did; that it was unseamanlike and not the proper way to approach the narrow space between the breakwaters. The proper way, he said—if she must come upon that course—was to come up to a distance of, say, two cables from "C" head, and then to "shape up properly," as he called it, so that she could enter on her right side. Really Lt.-Commander Yeoman's case was:

"I am not to blame for this; the *Premier* misled me; she had no right to come in that way, and is to blame because she attempted to make her entrance in a thoroughly unseamanlike way." In support of that contention Mr. Bucknill framed an argument upon the construction of r. 5, which he contended did not apply. He argued that a vessel "about to enter" from seaward of the channels meant a vessel going to enter the water which might reasonably be taken to be included in the word "channels"; and that the *Premier*, coming in the way she did, was never in a position of "about to enter." The word "about," he contended, must mean that the ship shall approach so as to indicate clearly and definitely her intention to enter, and that the *Rainbow* was under no duty to act until the intention of the *Premier* was made manifest. "Channels," he said, ought not to be limited to the water between the heads, but must be taken to include so much of the water as lies on either side of the imaginary line as a vessel properly navigated can be reasonably expected to use. In support of this argument Mr. Bucknill cited *The Kaiser Wilhelm der Grosse* (1) and *The Harvest.* (2) Both these cases are authorities for the proposition that a vessel entering a narrow channel is not to run across it close to pier-heads or other objects which define the channel but must get on to her right side. But in this case the *Premier* was not seeking to run across the pier-heads in order to get on her right side; she was passing, as she says, within 2 to 2½ lengths of "C" head, but "C" head was on her right side, if one construes this entrance—as I have no doubt it should be construed—as a narrow channel. I do not think, therefore, that either of these decisions assist very much in elucidating the meaning of what seems to be a somewhat fine drawn regulation.

To my mind the plain meaning of r. 5 is that a vessel leaving the harbour is to hold back and not get into the waterway between the piers, whether that waterway is considered as an imaginary line, or as two cables one side of the line or both sides of the line, until any vessel which is seeking

(1) [1907] P. 36.

(2) 11 P. D. 14, 90.

to enter the harbour has passed in. I think Mr. Bucknill's argument gives too literal a meaning to the words "channel between the breakwaters," and ignores the later words of the sentence: "vessel, or vessels, shall have passed in." It seems to me obvious, if one takes the whole of that sentence, that the rule is not purporting to lay down how vessels shall, or shall not, approach the channel for the harbour, but is purporting to lay down in the clearest language that the outgoing vessel shall be the give-way vessel, and that the vessel coming in shall have the right of way. Mr. Digby, for the plaintiffs, put the case still higher, for he was disposed to claim that the incoming vessel was in the same position as a stand-on vessel under the crossing rule. That view does not commend itself to me. A stand-on vessel under the crossing rule has a duty to keep her course and speed. I do not think that a vessel entering Portland Harbour between the breakwaters has any duty to keep her course and speed. Indeed, before I have finished giving judgment, it will be quite clear that my view is very different to that. I think the interpretation which Mr. Bucknill seeks to give the rule is much too narrow, and that the broad sense of the rule is that the vessel coming out must keep back and keep out of the way of the vessel that is coming in.

The *Rainbow* was the vessel coming out and the *Premier* was coming in. A collision took place in what may fairly be called one of "the channels between the breakwaters," and when one reads this rule and finds an outgoing vessel in such a place in collision with a vessel coming in, it seems to me that there can be no doubt that, up to a point at least, the outgoing vessel must be to blame. When I add that it is agreed that at the moment of collision the *Premier* was stationary and the *Rainbow* had some speed, varying in estimate from 4 to 5 knots on the one side and 2 knots on the other, it is clear that the *Rainbow*, if my view of the rule is correct, must be held to blame.

[His Lordship then dealt in detail with the navigation of each vessel. He said that the *Premier* obviously had a very bad look-out. They only saw the mast of the *Rainbow* over the breakwater a very short time before the collision. "They were approaching the harbour—as they were entitled to do—at a fairly fine angle. Approaching it in this way it would be necessary for them to make a sharp turn. They were approaching what may be called a semi-blind corner at full speed with a bad look-out, preparatory to making a sharp turn, and the Elder Brethren advise me that to approach the harbour entrance at that speed in that way was bad seamanship. That is very different from saying that it is, and always must be, bad seamanship not to shape up for the channel in the way the defendant claimed was the only proper way to approach the entrance. The decision I am giving on this point is limited to the facts of this case." That negligent seamanship, said his Lordship, contributed to the collision, for if those on the *Premier* had satisfied themselves by a good look-out that there was a vessel or vessels moving in the harbour which might be seeking to come out, it was hardly to be believed that they would not have taken off their way so as to have their vessel well in hand, or would not have given a warning blast to indicate that they were seeking to make the entrance. As regards the *Rainbow*, his Lordship said that he did not think those on board the submarine were keeping any particular look-out. Nobody seemed to have been in the position of an official look-out man, and the commander, when he did see the *Premier*, did not trouble to estimate her distance away at a time when, on any view of the facts, the *Premier* must have been close to the piers. In other words, he did not concern himself whether the *Premier* was coming in or not, and admitted in cross-examination that if he had appreciated she was going to the northern entrance he would not have carried on. That convicts him, said his Lordship, as being not only an offender, but the bigger offender of the two. He had broken the imperative rule that he should not go out when another vessel is coming in, and he had, in addition, a bad look-out. With a proper look-out directed to the most important matter, namely whether the channel was clear for him to go out, he ought to have been apprised that the *Premier* was approaching the entrance, but he took the chance and must pay the penalty.]

I think that the proper proportion of blame is that the submarine is two-thirds to blame and the *Premier* one-third.

Solicitors for the plaintiffs: *Waltons & Co.*

Solicitor for the defendant: *The Treasury Solicitor.*

E. C. M. T.

1933
Jan. 30.

MOULD *v.* MOULD.

Divorce—Permanent Maintenance—"Conduct of the Parties"—Undefended Suit for Divorce—Conduct not Pleaded in Answer to Petition—Evidence on Inquiry as to Permanent Maintenance—Estoppel—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-s.* 1*—Matrimonial Causes Rules,* 1924, *r.* 69.

The rule laid down in *Restall* v. *Restall* [1930] P. 189, that it is essential that the Court in exercising its discretion to grant permanent maintenance should have before it all relevant evidence of the conduct of the parties, extends to a case of dissolution of marriage in which there has been no defence to the original petition, although the conduct in question might have afforded possible defences which would have been an answer if pleaded.

A petition for maintenance is a proceeding separate and distinct from the original petition for dissolution. A respondent who desires to raise in answer to the petition for maintenance, as conduct of the petitioner, within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, sub-s. 1, matters which may have afforded a defence to the original petition is not estopped by his previous failure to plead them to the original petition.

ADJOURNED SUMMONS.

On November 29, 1928, Elsie Katherine Mould filed a petition for restitution of conjugal rights. There were two children of the marriage.

The respondent, Herbert Hodson Mould, by his answer and particulars set up just cause for leaving the petitioner—namely, the cruelty of the petitioner, and close intimacy of the petitioner with a named man without, however, alleging adultery. The petitioner replied traversing these allegations. The petition was not brought to trial.

On June 24, 1929, the parties entered into a deed of separation, and the suit for restitution was dismissed on October 8, 1931, without any withdrawal by the respondent of the charges he had made.

On October 5, 1931, the petitioner filed a further petition for dissolution of marriage on the ground of the adultery of the respondent. The respondent did not defend this suit, and a decree absolute was pronounced on October 17, 1932.

On September 28, 1932, the petitioner had filed a petition for maintenance. By his answer to this petition the respondent set up as conduct of the petitioner requiring consideration under the Supreme Court of Judicature (Consolidation) Act, 1925, the same matters as had been previously alleged by him in answer to the petition for restitution of conjugal rights, and in addition the adultery of the petitioner with the man named in answer to the suit for restitution of conjugal rights and intimate association with another man.

On December 5, 1932, at the instance of the petitioner a registrar made an order (inter alia) striking out from the answer the various allegations stated. From this order the respondent appealed to the judge in Chambers, who adjourned the summons into Court for argument.

H. B. D. Grazebrook for the husband. The registrar's order should be rescinded. The allegations in question are clearly material on the question of conduct of the parties within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, c. 49, s. 190, sub-s. 1, and should be inquired into. I rely on the decision of the Court of Appeal in *Restall* v. *Restall*. (1) It is true that that was a case of nullity of marriage, but there is no distinction in the relevant section between divorce and nullity.

[Bateson J. These allegations might have disposed of the petition for dissolution if raised then. The wife would have remained a wife. Now that the husband has got rid of his marriage by allowing the petition to go by default, he is raising the same allegations to free himself from his liability to support his wife.]

---

(1) [1930] P. 189.

[*Grazebrook* referred to *Fowler* v. *Fowler* (1), a case in which the President remitted for inquiry by a registrar allegations of conduct on the part of a wife, petitioning for maintenance, which had not been pleaded by the respondent husband to a petition for divorce.]

G. C. Tyndale for the wife. *Restall* v. *Restall* (2) was cited to the registrar and treated by him as not being in point. In that case the marriage was void ab initio. The decree was merely declaratory. No matter such as the present allegations could have been pleaded. In a case of dissolution of marriage "conduct of the parties" may consist of matrimonial offences which would be material on the merits of the suit. The registrar decided in effect that the husband cannot stand aside and raise counter-charges after decree absolute.

[BATESON J. The question is whether the husband has practically withdrawn the charges by not charging them in the suit for dissolution.]

In dissolution a respondent who has made charges amounting to absolute or discretionary bars to relief cannot maintain them merely on the question of an allowance if he has not raised them in the principal suit.

[BATESON J. A counter-charge of adultery must be proper matter of consideration on the question of an allowance in deciding whether the allowance should be limited dum casta.]

By not raising the charges in the suit the husband is estopped from raising them on the question of allowance: *Henderson* v. *Henderson* (3); Spencer Bower on Res Judicata (1924 ed.), p. 108, § 165. A party must raise his whole case. The principle is that of res judicata. The procedure in cases of maintenance has been altered by the Matrimonial Causes Rules, 1924, r. 69, which gives the registrar power to make orders instead of reporting to the Court. This gives the registrar the discretion formerly vested in the judge, and the exercise of that discretion should not be lightly interfered with.

---

(1) (1932) In Chambers, unreported.

(2) [1930] P. 189.

(3) (1843) 3 Hare, 100, 115.

[He also referred to *Scott* v. *Scott* (1) and *Winstone* v. *Winstone*. (2)]

BATESON J. I think this case is concluded by the authority of *Restall* v. *Restall*. (3)

The parties were married on June 21, 1923. In November, 1928, the wife petitioned for restitution of conjugal rights, and a great many charges were made by the husband in answer to that petition, which answer was filed on January 30, 1929. Some of those charges reappear in the answer to the petition for maintenance, but they are not the same in the two cases.

On June 24, 1929, there was a deed of separation drawn up between the parties, and eventually the petition for restitution was dismissed on October 8, 1931, but there was no withdrawal of the charges by the husband. In the same month, October, 1931, there was a petition by the wife for divorce—no doubt the husband was anxious for a divorce, as well as his wife—and the wife, the husband not defending the suit, obtained a decree nisi on April 8, 1932, which decree nisi was made absolute on October 17 of that year. On September 28 of the same year the wife took out a maintenance petition, and on November 17 the husband answered that petition. In para. 10 of his answer he said, " At the hearing of the petition for permanent maintenance the following facts and circumstances should be taken into consideration," and he set out in fifteen sub-paragraphs a great many of the charges which he had made originally in the answer to the petition for restitution of conjugal rights, and some additional ones. They include cruelty. They also include a specific charge of adultery with the man already named in the answer in the suit for restitution, which had not been previously

(1) [1921] P. 107. (2) (1861) 2 Sw. & Tr. 246, 247.
(3) [1930] P. 189.

charged, and of association with another man. Thereupon his wife took out a summons before the registrar to strike out the whole of para. 10.

Sect. 190 of the Supreme Court of Judicature (Consolidation) Act of 1925 says that: "The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable." So that in para. 10 of the answer the husband is stating that he will rely on the question of the conduct of the parties, and he has given a long list of particulars, particulars which might well have been set up apparently (for all I know with success, as he uses the words "cruelty" and "adultery") as an answer to the petition for divorce by the wife. He did not choose to do so then, no doubt for very good reasons, but he now chooses to do so and says he is entitled to do so under s. 190.

Sect. 190 has been interpreted in the case of *Restall* v. *Restall*. (1) That was a case where the petition was one for nullity, and the husband was met with a petition for maintenance by the wife, and he made serious allegations against her of her conduct both before and after the marriage. The Court of Appeal in that case dealt with this s. 190 and interpreted it. The Court decided that the conduct of the wife, both before and after marriage, is a matter which is properly pleadable. I think I am bound to follow that decision. It was a decision on the section. It seems to me directly in point and no distinction was made in that case, as counsel for the wife tries to make in this case, that it was a nullity petition as distinct from a divorce petition. The section is in terms perfectly plain. It is not limited in any way. It simply says that such matters may be raised. Further, it seems to me that a good many of these allegations in para. 10 go to the question of whether a dum casta

(1) [1930] P. 189.

1933

MOULD v. MOULD.

Bateson J.

clause should be inserted or not in any order for maintenance. Therefore, it is impossible to say that they may not be raised, and I am not asked to distinguish between these particulars as to which are good and which are bad. I am merely asked to strike out the whole of this paragraph. I do not think that this can be done. How far the other matters may have a bearing upon it I do not know at present. Counsel for the wife seeks to distinguish *Restall* v. *Restall* (1) not only on the ground that they were proceedings for nullity and not for divorce, but also, as he says, because all these matters which are now set up in this answer could have been pleaded in the divorce suit and might well have been a bar to the decree. He says that it is not right that the respondent should get the benefit of an undefended decree, and then be allowed to set up what would have been possibly a good defence to the petition. I agree with him to a very large extent that it is most inconvenient and very unsatisfactory that such should be the case, but it seems to me I am obliged to follow the decision in *Restall* v. *Restall.* (1) Counsel says that as these matters have been raised by him on the divorce petition, the husband is estopped from setting them up now. I cannot see any estoppel. The matter has never been decided. He says it is estoppel by implied res judicata. The matter has never been investigated. It is quite true that if the husband had appeared he might well have gone into these matters. How far these matters may be matters going to the question of amount or going to the question of a dum casta clause on a maintenance petition has not been decided, and I do not see how the husband can be estopped from raising them now.

The other point counsel makes is that it is in the discretion of the registrar, and that I ought not to interfere with it. It may be that it is to a certain extent within the discretion of the registrar to strike out a pleading or not, but I think that that discretion must be exercised in accordance with the decisions that have been given; and much as I regret that this method of dealing with the case should be allowed,

(1) [1930] P. 189.

I think I am bound to allow it; although I think that it is most inconvenient and undesirable that a husband should be allowed to lie by, with all these charges, until the maintenance petition comes on to be heard. It leads, at any rate in my view, to something very like collusion, although it may not perhaps amount to it in this case. It means that the registrar will have to try what is practically a divorce case in going into all these matters, though no doubt the conduct of the husband in lying by like this may be a matter which will have to be considered when the whole case comes to be dealt with.

I have been referred to *Henderson* v. *Henderson* (1) on the doctrine of estoppel and to Spencer Bower on Res Judicata. (2) I have also been referred to *Scott* v. *Scott* (3) and *Winstone* v. *Winstone* (4), but neither of these two latter cases seems to me to have any real bearing on the matter that I have to try. It seems to me that where you have a different proceeding, as a petition for maintenance is, although it is in the same suit, there is no difficulty whatever under the section in saying that the conduct of the parties, which has to be taken into consideration, may be pleaded. Therefore I must reverse the decision of the registrar.

Wife's costs.

Leave to appeal.

Solicitors for the husband: *Shelton, Cobb & Co., for Shelton, Wearing & Bates, Wolverhampton.*

Solicitors for the wife: *J. Carnegie, for Hatwell, Pritchett & Co., Birmingham.*

---

(1) 3 Hare, 100, 115.

(2) Ed. 1924, p. 108, § 165.

(3) [1921] P. 107.

(4) 2 Sw. & Tr. 246, 247.

R. M. M.

BRYCE v. BRYCE.

1932
Dec. 7, 8,
14, 15.

Divorce—Domicil—Intention to acquire Domicil of Choice—Evidence—Declarations of Intention—Admissibility of Declarations by Party claiming acquisition of Domicil.

On an issue as to domicil the declarations of a living person as to his intention of acquiring a domicil of choice are not subject to the usual common law rule which excludes evidence of statements of intention unless they are against the interest of the party making them. The declarations in question are to be duly weighed along with the rest of the evidence on the issue, although they have been properly described as being, unless they are accompanied by acts, the "lowest species of evidence, especially when encountered by conflicting declarations" of another party.

VERA FRANCES BRYCE, the wife, filed a petition dated November 30, 1931, claiming dissolution of her marriage on January 1, 1919, with Edward Daniel Bryce, her husband, on the ground of his adultery. The husband, by his answer, traversed the alleged adultery and denied that he was domiciled in England as alleged in the petition. On January 13, 1932, it was ordered that an issue be tried as to the domicil of the husband at the date of the institution of the proceedings. This issue now came on for hearing before Lord Merrivale, the President.

The facts were that the husband at the time of the marriage, which took place in England, had an English domicil of origin, and was educated in England and had resided in Peru, served in the army in the South African war, carried on business in the Straits Settlements, and served in France in the Great War. He had been previously married in England, and that marriage was dissolved on May 7, 1917. In the year of the present marriage the parties took up their residence in Paris: according to the wife, because the husband desired to escape English taxation; according to the husband, with the intention on his part of acquiring a French domicil of choice. In the course of the evidence various friends of the husband in Paris were called to prove declarations by him as to his intention of acquiring a domicil of choice in France.

1932

BRYCE
v.
BRYCE.

R. F. Bayford K.C. and *T. Bucknill* for the wife. Declarations of intention as to domicil are of doubtful value: *Hodgson* v. *De Beauchesne.* (1) They must accompany some act of the declarant: *Brodie* v. *Brodie.* (2) [They also referred to Phipson on Evidence. (3)]

Fergus Morton K.C. and *F. L. C. Hodson* for the husband. The principle on which the declarations are admissible being that they accompany an act of the party making them, the nature of the residence in France is the act to be considered, and the declarations accompanying the period of residence are admissible to show the animus of that residence. The act may be continuous extending over a period: *Bell* v. *Kennedy* (4); *D'Etchegoyen* v. *D'Etchegoyen* (5); Cockle's Cases and Statutes on the Law of Evidence (6); *Rawson* v. *Haigh.* (7)

[THE PRESIDENT (LORD MERRIVALE) referred to *Munro* v. *Munro.* (8)]

The declarations were admitted de bene.

THE PRESIDENT (LORD MERRIVALE) in the course of his judgment: I have had before me a body of evidence as to intention. There was a question whether the evidence of friends of the husband of declarations of intention on his part was receivable. I received the evidence de bene esse. The common law rule, no doubt, is that the statements of a living person as to his intentions cannot be received unless they are against his interest. To what extent the rule applies in cases in domicil is a little difficult to determine, because domicil is a matter not only of private interest but of public concern, and the dividing line cannot be laid down very definitely. Counsel for the wife very frankly brought to my notice the case of *Brodie* v. *Brodie* (2), as one which ought to be in the mind of the Court, and seems rather to support the view of admissibility of these declarations within certain limits than to reject it. In that case a witness was called

(1) (1858) 12 Moo. P. C. 285, 325.

(2) (1861) 2 Sw. & Tr. 259.

(3) 7th ed., p. 61 Res Gestæ.

(4) (1868) L. R. 1 H. L. Sc. 307.]

(5) (1888) 13 P. D. 132.

(6) 5th ed., p. 70 Res Gestæ.

(7) (1824) 2 Bing. 99.

(8) (1840) 7 Cl. & Fin. 842.

by a petitioner for divorce to give evidence of declarations by the petitioner as to domicil, the issue being whether there was domicil of the petitioner to found jurisdiction. The witness gave an account of expressed intention in which he said: "I purchased a sheep station from him; at that time I understood from him" (at a time when the petitioner was the vendor of a sheep station in Australia) "that he was selling off to return home and live in this country." That was, perhaps, admissible upon the ground that it explained with what intention the act between the parties was being concluded. But that does not really dispose of the matter. The Full Court (Sir Cresswell Cresswell and Wightman and Williams JJ.) said: "We say nothing as to what the effect of the evidence might be in a testamentary suit. We think that the petitioner was bona fide resident here, not casually as a traveller." There they left the matter. They received the evidence and held domicil established. That evidence was supplemental to the evidence of the petitioner. Such an authority is at any rate ground for giving proper consideration to the evidence in this case of the friends of the husband who were called. The wife, on the other hand, when asked, "Did you hear your husband ever express any intention of living permanently in France?" replied, "Never. There has never been any question of it." That was the kind of evidence on the part of the wife, and she called evidence to the effect that the expressed reason of the husband continuing to live in France and not coming to live in England was that the taxes in England were so high that they could not afford to live here.

And later, in the course of his judgment, the learned President added: As to the evidence of the witnesses with respect to intention I received it de bene. I think that in some respect or other a considerable part of it was undoubtedly evidence, and some part of it was not, but I have taken it into consideration, and I have considered in the light of the authorities what weight should be attached to evidence of declarations of intention. In a case of *Hodgson* v. *De Beauchesne* (1),

(1) 12 Moo. P. C. 285, 325.

1932

BRYCE
v.
BRYCE.

The President.

which was referred to, this was said by an eminent judge (Dr. Lushington): "Such evidence, though admissible, has been considered by many authorities as the lowest species of evidence, especially when, as in this case, encountered by conflicting declarations." Sir Cresswell Cresswell also had to consider that matter quite early in his time, and said this: "Conversations and declarations unless accompanying acts have, I think, been properly described as the lowest species of evidence. They must not, however, be discarded, but duly weighed, together with the rest of the evidence adduced": *Crookenden* v. *Fuller*. (1)

The learned President, proceeding to deal with the evidence generally, found that the husband had not established a permanent residence in France with the intention necessary to establish a domicil, and gave judgment on the issue for the wife with costs.

Leave to appeal refused.

Solicitors for the husband: *Druces & Attlee.*
Solicitors for the wife: *Lewis & Lewis.*

---

(1) (1859) 1 Sw. & Tr. 441, 450.

R. M. M.

THE ZIGURDS.

C. A.
1932
Dec. 14.

Shipping—Assignment of Freight—Ship's Agents—Notice of Assignment—Sufficiency of Notice—Priorities.

Among the claimants to a fund in Court, representing the proceeds of a Latvian steamship and her freight, were the ship's agents and a mortgagee. Both claimants had obtained documents which, according to the finding of the Court, constituted good equitable assignments of the freight to each of them. The mortgagee's assignment was of prior date, but the ship's agents relied on a letter to the receivers of the cargo, dated March 5, 1931, as notice of the assignment sufficient to give the ship's agents priority, the mortgagee not having given any notice at that time. The letter was in these terms: "We beg to give you notice that we hold Captain's authority to collect the freight per this steamer's cargo, against which we have made payments."

Langton J. held that although these words might convey to an experienced business man that an assignment had taken place they were not so clear and conclusive as to be an actual notice of an assignment.

The ship's agents appealed:—

Held, that the notice was sufficient to convey to the receivers of the cargo that the ship's agents had the right to receive the freight; that accordingly it constituted sufficient notice of the assignment, and, therefore, that the ship's agents had priority over the mortgagee.

Judgment of Langton J. [1932] P. 113, at p. 129, reversed on this point.

Appeal by a firm of ship's agents on a motion to determine priorities.

The appellants, E. A. Casper Edgar & Co., obtained judgment, subject to priorities, for 1500*l.* in respect of advances for necessaries supplied to the Latvian steamship *Zigurds*. The claim was made against the freight, 1837*l.* 14*s.* 10*d.*, which was due from the receivers of the cargo, Messrs. Churchill & Sim, and had been paid into Court.

The appellants acted as ship's agents for the *Zigurds* at West Hartlepool, and were asked to make disbursements and incur expense on behalf of the ship. Before doing so, on March 2, 1931, they obtained the following document addressed to the cargo owners, which was signed by the master of the *Zigurds* with the approval and consent of her managing owner: "Please pay the freight for my vessel, the *Zigurds*, and all demurrage which may be payable under the charter to my agents, E. A. Casper Edgar & Co., Ld., and oblige."

The appellants alleged that this letter constituted a legal, or, in the alternative, an equitable assignment of the freight, and Langton J. found that it was a good equitable assignment. A mortgagee, Alfred Harris Smith, however, claimed that under an agreement supplementary to the mortgage, and dated April 30, 1929, he had a legal, or alternatively, an equitable assignment of the freight which would take precedence of the ship's agents' assignment. The Court found that the supplementary agreement constituted a good equitable assignment.

On the question of priorities, Casper Edgar & Co. claimed that they had priority over the mortgagee because priority was determined by the order of the date of the notice of assignment, and that they had given notice to the receivers of the cargo on March 5, 1931, whereas the mortgagee had failed to give any express notice of his assignment at any time. The notice relied on by Casper Edgar & Co. was in the following terms: "S.S. *Zigurds*. We beg to give you notice that we hold Captain's authority to collect the freight per this steamer's cargo, against which we have made payments."

Langton J. said that the conclusion to which he had come "after considerable doubt and hesitation" was that these words might convey to an experienced business man that an assignment had already taken place, but that they were not so clear and conclusive as to be an actual notice of an assignment, and, accordingly, that the mortgagee took priority.

Casper Edgar & Co. appealed.

W. P. Spens K.C. and *J. V. Naisby* for the appellants. Langton J. was wrong in holding that there was no valid notice of the assignment. The language used is immaterial if the meaning is plain. "All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person," per Lord Macnaghten in *Wm. Brandt's Sons & Co.* v. *Dunlop Rubber*

Co. (1) The test to be applied in ascertaining whether a particular document operates as notice of an assignment is: does it convey to the mind of any rational man that the debt has been transferred? Here it is clear that the notice conveyed this information; Churchill & Sim have never said that they were under any misapprehension as to the meaning of the notice; and they would have ignored the notice at their peril.

[They were stopped.]

Harry Atkins for the mortgagee. The letter of March 5 does not even suggest an assignment to the mind of the reader, it is merely an authority to pay.

[Lawrence L.J. You are ignoring the last words "against which we have made payments."]

[Scrutton L.J. referred to *Crédit Foncier d'Algerie et de Tunisie* v. *Simpson, Spence & Young.* (2)]

The appellants do not say that they are entitled to a charge. That omission creates a doubt as to the effect of the notice, and words which might suggest an assignment to one man but would not necessarily suggest it to another are not sufficient.

Scrutton L.J. Counsel have said all that can be said in this case. The point is a short one. As has been repeatedly the case in the last few years of bad times, a vessel has arrived in this country laden with debts and obligations in the sense that a number of people had claims against her, and by the procedure in rem the ship and freight have been put in the Admiralty Court. The Court is then concerned with the determination of priorities on a fund which is generally quite insufficient to satisfy all the claims.

In this particular case a number of claims were put forward, but, fortunately, they have disappeared at this stage, and the present conflict is between two claimants who have equitable assignments. In these circumstances—apart from notice—the assignments rank according to their priority. The notice may change the later assignment into a prior

(1) [1905] A. C. 454, 462.

(2) (1932) 42 Ll. L. R. 32.

C. A.
1932

THE ZIGURDS.

Scrutton L.J.

assignment. Now, the two parties who are contending here are a mortgagee who is assumed for the present purpose to have an equitable assignment of the freight, and the appellants, the ship's agents, whose case is that they have an equitable assignment because they obtained the following document signed by the master with the consent of the managing owner: "Please pay the freight for my vessel, the *Zigurds*, and all demurrage which may be payable under the charter to my agents, E. A. Casper Edgar & Co., and oblige." There is no express mention of the party to whom the letter is addressed, but it is obviously addressed to somebody who is liable to pay freight. There is this evidence as to the circumstances in which the document came to be given. When the *Zigurds* arrived at West Hartlepool, first the master and then the managing owner went to the appellants and asked them to do the ship's work and find the money to make the necessary payments. The appellants declined, and in order to induce them to make the payments this letter was given them to put in their possession a fund out of which they could advance the necessary money. So much for the equitable assignment, which is not now disputed.

The question, however, is: Was notice of the assignment given to the persons who had to pay the freight so as to bind them to pay it to the appellants? That turns on a letter of March 5, 1931, addressed to a well known London firm, largely dealing in timber, Churchill & Sim, who, it appears, were the people mentioned in the bill of lading as being liable to pay freight. The letter was: "Dear Sirs,—S.S. *Zigurds*: We beg to give you notice that we hold Captain's authority to collect the freight per this steamer's cargo, against which we have made payments.—Yours faithfully for E. A. Casper Edgar & Co., Ld. (Signed) D. Edgar, director."

I do not know why that notice should not have been made clearer than it is, but there it is, and I think it amounts to this: "You must pay the freight to us, and the reason why you must do so is that we have this authority to collect, and have made advances against it." The question is: Is that sufficient notice? It is clear from the repeatedly cited passage in *Wm. Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (1) in Lord Macnaghten's judgment, that the form of an equitable assignment may be very vague: "It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril."

The learned judge, who, I am sure, displayed his usual patience in dealing with a multitude of people on a multitude of points, puts in two sentences his question and his answer: "The conclusion to which I have come, after considerable doubt and hesitation, is that these words might convey to an experienced business man that an assignment had already taken place, but they are not so clear and conclusive as to be an actual notice of an assignment. . . . . Accordingly, in my view, Messrs. Casper Edgar & Co. fail in their contention, and the mortgagee takes priority over them upon this branch of the claim." The short question, therefore, is whether this Court takes the same view of the letter of March 5, and I have come to the conclusion, especially because of the concluding words—"against which we have made payments"—that they should convey to Churchill & Sim that the appellants have the right given them, by the captain, to receive these payments. They made advances on the faith of that right, and they say that Messrs. Churchill & Sim must pay the freight to them. If there is that notice, then the ship's agents obtain the priority they ask for, and the schedule of priority in the judge's judgment must be altered so as to put the appellants' claim in priority to that of the mortgagee to the extent of the 1800*l.* odd which is their claim.

LAWRENCE L.J. I agree. One of the requisites to constitute a legal right to sue for a debt on an assignment is

---

(1) [1905] A. C. 454, 462.

C. A.
1932

THE ZIGURDS.

Lawrence L.J.

that the debtor should be notified of that assignment. That is provided by s. 136, sub-s. 1, of the Law of Property Act, 1925. Now, the Act does not lay down what constitutes express notice, and on the corresponding section of the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 6, there are decisions showing that all that is requisite to give such notice to the debtor is to bring home to his mind that he cannot safely ignore it and pay the money to somebody else after having received the notice.

Was such a notice given to the debtors in this case ? The facts are that by a document which has now been held to amount to an equitable assignment the persons giving the notice were authorized to receive the debt from the debtors. They gave notice that they had received that authority. Now, I can conceive it being said that that notice might not have brought home to the debtors' minds that the authority referred to in it amounted to an equitable assignment, but the assignees were careful to add to that notice words which, I think, must have, or ought to have, brought home conclusively to the debtors—and I have no reason to believe that they did not—that the authority had been given for valuable consideration. The notice states : " We beg to give you notice that we hold Captain's authority to collect the freight per this steamer's cargo, against which we have made payments."

The learned judge in the Court below thought that the meaning of that notice was doubtful, because it might convey to the debtor that there had been a previous assignment of the freight, and that this was only a notice consequent upon that assignment. I am afraid, with all respect to the learned judge, I cannot agree with that view. There is no suggestion here that the appellants had become the owners of the freight before this authority had been given. The notice seems to me accurately to state the effect of the authority—namely, that it had been given in consideration of their having made advances against the freight. The debtors do not say they mistook that authority for something else and paid the freight in good faith to a third party. This is a claim made by a mortgagee, who failed to give notice, and he has the unenviable task of trying to persuade the Court that these business people to whom the notice in question was addressed —Messrs. Churchill & Sim—did not understand that it meant that the authority had been given for value, and could not be revoked. There is no evidence that they misunderstood its meaning, or that they attempted to ignore it, and pay somebody else. In my judgment, the notice was sufficient to bring home to the minds of the debtors that there has been an equitable assignment of the debt. I agree, therefore, that this appeal succeeds and ought to be allowed.

GREER L.J. I also agree. There is no question involved in this appeal which raises any doubt as to whether the appellants did obtain—before they wrote the letter of March 5—-an equitable assignment which gave them a charge upon the freight in respect of the advances which they, in the ordinary course, had made or would make as agents for the ship which had come to West Hartlepool. The only question is whether they could claim priority to an earlier equitable assignment by reason of the fact that they were the more diligent of the two equitable assignees in giving notice to the persons who were liable to pay the freight—Churchill & Sim. They gave notice in these terms: "We beg to give you notice that we hold Captain's authority to collect the freight per this steamer's cargo, against which we have made payments." Now, if the notice had stopped with the word "cargo" I should be inclined to the view that it was not a notice of any equitable assignment, though in the ordinary course, if the appellants had collected the freight and nobody had interfered to prevent them from collecting it, they would have had a lien at common law in respect of their charges and their advances. I cannot understand the words "against which we have made payments" being added except with the object of informing Churchill & Sim that the appellants had obtained rights against the freight in respect of the payments which they had made or were going to make. I do not for a moment suppose that Churchill & Sim misunderstood the letter which they so received.

It is common knowledge in the shipping business that one of the ways in which this business is carried on for foreign vessels coming to this country is that the agents do not incur expense on behalf of the ship without obtaining some security. Churchill & Sim, I should think, would have no difficulty in interpreting this document as meaning: "The captain has given us authority to collect the freight in order that we may use it as the security for the payments which we are going to make on behalf of the ship." I have no doubt that that was intended, because the appellants refused to have anything to do with the ship until they got this authority.

I cannot help thinking that it is a pity that, in business matters where large sums are involved, people do not think it worth while to consult their solicitors and ask for 13*s.* 4*d.* worth of protection against liabilities that may be incurred. They do it in small matters where they are considering liabilities of a few pounds, but they do not do it in these large matters. They think they are quite competent to protect themselves sufficiently by their everyday business language, and the result is that we get litigation of this kind, which has to come to the Court of Appeal to be finally settled, or, if not there finally settled, will have to be finally settled by some further tribunal. I agree that this appeal should be allowed, and the order made as my Lord has said.

Solicitors for the appellants: *Middleton, Lewis & Clarke, for Middleton & Co., Sunderland.*

Solicitors for the mortgagee: *Constant & Constant.*

E. C. M. T.

HORNIMAN *v.* HORNIMAN.

1932
July 25;
Nov. 14, 23;
Dec. 20.
1933
Feb. 14.

Divorce—Maintenance—Principles of Awards of Permanent Maintenance—Alimony in Judicial Separation distinguished—Statutory Discretion of the Court—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 32—*Matrimonial Causes Act,* 1866 (29 *&* 30 *Vict. c.* 32), *s.* 1—*Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-ss.* 1, 2.

In cases of dissolution of marriage, permanent maintenance is to be awarded on principles distinct from those governing the allotment of permanent alimony in judicial separation, which for the most part follow the practice of the Ecclesiastical Courts. Permanent maintenance is ordered pursuant to the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, sub-ss. 1 and 2 (1), on a statutable basis which gives the Court a discretion and specifies the manner of its exercise. Considerations founded on the state of the law at the passing of the Matrimonial Causes Act, 1857, s. 32, which gave a husband possession of his wife's property, no longer attach since the legislation which from 1870 onwards has affected the status of married women. There is no arithmetical rule of proportion in allotting the joint income between the spouses in cases of dissolution such as may still obtain in those of judicial separation; and in fixing what amount of maintenance for the wife is reasonable, having regard to her fortune, the ability of the husband and the conduct of the parties, the Court is solely guided by its own discretion.

Motion to confirm registrar's report.

Wife's petition for permanent maintenance.

The petitioner, who had lived apart from her husband under a deed of separation executed in January, 1930, obtained a decree nisi for the dissolution of her marriage which was made absolute on November 16, 1931. Shortly afterwards she had remarried. Both spouses had considerable incomes and both had contributed to the funds of a marriage settlement, which was being varied at the instance of the wife without opposition by the husband. By her petition for permanent maintenance the wife further claimed to have secured to her such a proportion of the income of her husband as would make her income for the future equivalent to one-third of the combined incomes. This claim was being contested before the registrar, and was ripe for decision in July, 1932, when the death occurred of the father of the respondent, leaving testamentary dispositions in favour of the respondent. The petition for maintenance now came before the Court on motion on the report of the registrar, a supplemental report dealing with the testamentary dispositions of the father of the respondent, and an agreed statement of facts.

---

(1) Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49):—

Sect. 190, sub-s. 1: "The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable . . . ."

Sub-s. 2: "In any such case as aforesaid the court may, if it thinks fit, by order, either in addition to or instead of an order under sub-section (1) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable."

There were four children issue of the marriage.

By the marriage settlement the husband contributed shares in a business concern, producing an income of 550*l.* per annum, and the wife property worth 10,000*l.* The separation deed referred to provided that during the joint lives and while the wife remained chaste and unmarried the husband should pay her the yearly sum of 150*l.*, payable quarterly in advance, in addition to all the benefits she took under the marriage settlement. The deed also dealt with matters concerning the children and charged the quarterly allowance on the husband's fund under the settlement, made provisions as to the husband's property in which the wife was given rights or interests, and extinguished a successional interest the husband might have taken by survivorship. It was proposed to extinguish the husband's interest in the wife's settled property by an order in the usual form to be made on the petition for variation, and by virtue of the terms of the deed and of various orders of the Court maintenance for the three younger children of the marriage was provided for at the rate of 300*l.* per annum each.

The husband's total income in the three years 1929, 1930 and 1931 was reported as averaging 6125*l.* after payment of expenses. He had spent large sums on properties of disputable value and accepted corresponding financial commitments. Apart from the provisions for the three children referred to, the wife was found by the report to have a gross yearly income of 1057*l.* from settled moneys, and the income of her present husband was stated at 1000*l.* per annum.

Upon the figures ascertained at the first inquiry before the registrar, counsel for the petitioner arrived at a figure of 1257*l.* per annum as the annual amount which according to their contention ought to be contributed by the respondent by way of addition to the petitioner's personal income of 1057*l.* per annum so as to bring her total income to one-third of a joint income of the spouses calculated at 6942*l.*, and they contended that the Court should order the respondent to pay to her for her life the annual sum of 1257*l.*, of which 550*l.* should be secured.

Counsel for the respondent on the other hand, putting the net income of the respondent at 3533*l.* per annum, contended that the annual sum could be no more than 473*l.*, and that in view of the relative position of the parties an order for payment at that rate for the joint lives under the Act of 1925, s. 190, sub-s. 2, was the largest that should be made and without security.

W. O. Willis K.C. and *H. W. Barnard* for the petitioner.

T. J. O'Connor K.C. and *Hon. Victor Russell* for the respondent.

[The discussion when the case was before the Court was with reference to the various questions of figures and amounts, conclusions of which are given in the judgment. The case is reported as affirming the discretion of the Court in allotting permanent maintenance and the statutory limitations of that discretion, and negativing any supposed tendency of the Court to apply any system of mathematical proportion in the amounts of its orders.]

Cur. adv. vult.

1933. Feb. 14. THE PRESIDENT (LORD MERRIVALE). The exceptional proceedings in this case have necessitated closer examination than usual of the material facts and of the statutory provisions under which the application before the Court purports to be made. [The learned President then dealt with the facts and proceedings as set out, and continued :] This is not a case of judicial separation with a decree which under the statute is to have the same force and effect as a decree for divorce a mensa et thoro had immediately before the commencement of the Matrimonial Causes Act, 1857. Such a decree no doubt carries with it a prima facie claim for alimony on the footing on which alimony was fixed in the Ecclesiastical Courts, though, as was explained here in *Dean* v. *Dean* (1) some years since, there is a judicial control on proper grounds even in such cases.

The power here in question is statutory. [The learned President read the words of the Supreme Court of Judicature (Consolidation) Act, 1925, section 190, sub-ss. 1 and 2.] In applying the decided cases under the statutes now consolidated in the Act of 1925, it must not be overlooked that in some material respects certain elements of marital life have been transformed. In 1857 and for a good many years afterwards the common law operated to vest in the husband the personal property of the wife at the date of the marriage and such property as might accrue to her thereafter. Reference to cases like *Cooke* v. *Cooke* (2) and *Otway* v. *Otway* (3) shows the powerful operation in the earlier time of the fact that sometimes the guilty husband stood possessed of the wife's fortune by virtue of a marriage which was still of legal effect, although the Ecclesiastical Court might decree him to pay alimony and use its powers of attachment to enforce its decree. Sir John Nicholl sometimes said that apart from special circumstances half the income would not be an unreasonable proportion for the wronged party from whom the income had come. Since 1857 the situation of married women in respect of property has been transformed by a series of Married Women's Property Acts enacted in successive Parliaments from 1870 onward. The discretionary power brought into being by the Act of 1857, s. 32, and now expressed in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, sub-s. 1, and in the Act of 1866, s. 1, and now expressed in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, sub-s. 2, has its full scope, but various cases which illustrate it must be considered upon their material facts with regard to the matters the statute specifies.

---

(1) [1923] P. 172.

(2) (1812) 2 Phill. Ecc. 40.

(3) (1813) 2 Phill. Ecc. 109.

The outstanding decisions in the early days of the exercise of the jurisdiction here in question are *Fisher* v. *Fisher* (1), heard before Sir Cresswell Cresswell in 1861, and *Sidney* v. *Sidney* (2), heard before Lord Penzance, then Sir James Wilde, in 1865. Each case arose under s. 32 of the Act of 1857. The Act of 1866 probably came to be passed by reason of some difficulties which are discussed in Sir James Wilde's judgment in *Sidney* v. *Sidney.* (2)

The material passage in the judgment of Sir Cresswell Cresswell in *Fisher* v. *Fisher* (1) is as follows: "In the present case the wife elects to have the marriage dissolved, and, although she had strong grounds for complaint, I cannot consider her as in a position at all resembling that of a wife divorced a mensa et thoro. She might have been relieved from the necessity of living with her husband and have remained his wife, but her election was not to do so. Still, although she did so elect having good grounds for complaint, the respondent may be considered as in some sort depriving her of her position, and the legislature no doubt intended that she should not seek a remedy at the expense of being left destitute. Not being able to derive any assistance from the practice of Parliament or the Ecclesiastical Court, I must take upon myself the arduous duty of deciding what is reasonable in this case. I consider, then, that the wife ought not to be left destitute; on the other hand, I think it would not be politic to give to wives any great pecuniary interest in obtaining a dissolution of the marriage tie. The petitioner had no fortune of her own; the husband has some fortune and trading profits, but they are neither large nor certain.

(1) (1861) 2 Sw. & Tr. 410, 413.

(2) (1865) 4 Sw. & Tr. 178.

Under such circumstances I think I ought not to award more than a maintenance." This was done in the exercise of judicial discretion.

The judgment of Sir James Wilde in *Sidney* v. *Sidney* (1) emphasizes very vigorously the claims of a wife who has been driven by her husband's misconduct to seek dissolution of their marriage. Each of the parties had some secured income, and the matter was investigated as it would have been in a suit for judicial separation, and a figure was ascertained which the learned judge said was "as nearly as I have been able to calculate, the sum she would have received in the Ecclesiastical Court as permanent alimony." "I am at a loss," he said, "to discover any reason why the Court in construing and applying this section (i.e., s. 32 of the Act of 1857) should deal with the subject in any more niggard spirit than that in which the Ecclesiastical Court regarded the question of permanent alimony." "The needs of the wife and the wrong of the husband are the same in both cases. . . . . Why should not the husband's purse be called upon to meet both cases alike ? It has been said that in one case she remains a wife and in the other she does not. This remark would carry great weight if the provision were intended to continue in the event of her second marriage : but it can hardly affect the rate of allowance made and continued so long only as the wife remains chaste and unmarried." The material passage of the decree as recorded in the Registry at Somerset House is in these terms : "The Judge Ordinary pronounced and declared the said marriage to be dissolved and ordered that . . . . the respondent do secure to the petitioner the sum of 245*l.* per annum to be paid to the petitioner by equal quarterly payments so long as she shall remain chaste and unmarried."

It is worth while here to note that Sir James Wilde had made in 1864 an order on lines somewhat similar to those on which he proceeded in *Sidney* v. *Sidney* (1), but whereas alimony pendente lite in the earlier suit (2) had been ordered at the usual rate of a fifth of the husband's income,

(1) 4 Sw. & Tr. 178, 179, 180, 182. (2) *Cope* v. *Cope* (1864). Unreported.

1933

HORNIMAN
v.
HORNIMAN.

The President.

which was small, the learned judge in the exercise of his discretion fixed the payment for maintenance at a much reduced rate, and attached the condition "so long as she leads a chaste life and remains unmarried" as he did later in *Sidney* v. *Sidney*. (1) These were both discretionary orders. In 1867 the terms of the order in *Sidney* v. *Sidney* (1) were discussed in an appeal to the House of Lords. (2) The appeal failed hopelessly because the order was discretional: "Entirely a matter for the discretion of the judge" and "an order pronounced upon an application to the discretionary power of the Court" are phrases from the opinions of the noble and learned Lords who heard the appeal.

A time arrived when the limitation "dum casta et sola vixerit" was regarded as a matter of form so as to be no longer a matter of discretion, but in 1891 in the case of *Wood* v. *Wood* (3) the Court of Appeal found this to be an unwarrantable fetter upon the discretion. Again what was thought to be settled practice on some of the elements of these cases was invoked in 1930 in *Restall* v. *Restall* (4), and the Court of Appeal once more insisted on the necessity of giving attention to all the considerations prescribed by the statute. A year later in *Stibbe* v. *Stibbe* (5) the Court of Appeal placed the supposed arithmetical rule in what, as I respectfully suppose, is its proper place. The Master of the Rolls summed up the matter in these words: "In *Gilbey* v. *Gilbey* (6) it was laid down by the President that although the considerations which applied in the Ecclesiastical Courts to awards of alimony must have due weight in determining the proper award of maintenance to a wife after a decree of divorce, the assumption of a fixed arithmetical rule and an indispensable process of applying that rule is erroneous, and disregards the duty imposed by the section under which the ability of the husband and the conduct of the parties are to be considered to find out what is the reasonable amount." Having regard to the state of the authorities I am perplexed at the assumption still confidently made in cases like the present that irrespective of the facts there is a prima facie rule that a divorced husband should share his fortune with his former wife on the footing of the permanent alimony which would be allotted to a wife who had become judicially separated; in short that the case is not one of discretion but of arithmetic.

---

(1) 4 Sw. & Tr. 178.
(2) (1867) 36 L. J. (P. & M.) 73.
(3) [1891] P. 272.
(4) [1930] P. 189.
(5) [1931] P. 105, 110.
(6) [1927] P. 197, 200.

Before the Registrar, in the protracted discussions which are summarized by him in his report, an arithmetical computation on the one-third rule was what was being insisted on. The material passage in the Report runs thus: "Having regard to all the circumstances of the case, the conduct of the parties, and income of the petitioner, the allowance of 300*l.* a year in respect of each of three children and the probable diminution of the income of the respondent, I am of opinion that the respondent should pay to the petitioner 750*l.* a year less tax during joint lives and that no sum should be secured for her life." This report having been made on July 4, 1932, on July 12, notice of motion was given on behalf of the petitioner for "an order confirming it and such further and other order as may be just." For the respondent notice of motion adversely to the report and submission was given on July 19. Both motions came on for hearing on July 25. By that time the death of the father of the respondent was known to the advisers of the petitioner and at their instance the hearing of the motions was adjourned, and the petition for maintenance was referred back to the registrar, in order that consideration might be given to the testamentary dispositions of the father upon an agreed statement of facts; the registrar reconsidered the case and made his Further Report submitting to the same effect as in the first instance with a proviso relating to certain exceptional dispositions of the father's will.

The will in question provides that in case of "any action of the petitioner whereby any part of the respondent's income may become payable to the petitioner in augmentation of any annual sum now or at any time hereafter directed by the Court to be paid by him to her for her maintenance, the trusts of the will in the respondent's favour shall fail and determine." The trusts relate to the income of a sum of 10,000*l.* presently payable to trustees and reversionary interests in the residue of the estate of the testator said to be of the value of about 40,000*l.* The will also releases the respondent from his liability for 19,000*l.* lent him at interest by his father in 1929, but it makes the release subject to payment by the respondent of the legacy and estate duties attributable to the sum of 19,000*l.* The paragraph of the further report which deals with the dispositions of the father concludes with the finding that the net increase in the annual income of the respondent through his father's death "may be taken to be 597*l.*" Grounds for this view are sufficiently stated.

The effective submission in the Registrar's Further Report is in these terms: "Taking all the circumstances into further consideration though it may be that the amount payable during joint lives should be revised when the respondent's reversionary interest in the residue of his father's estate falls into possession, it is submitted as in the previous report." I take the meaning of the provisional reservation attached to the submissions to be this: "inasmuch as the order proposed would be an order under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, sub-s. 2, such an order would by virtue of the proviso in s. 190, sub-s. 2, be subject to increase in case the Court is satisfied that the means of the husband have increased, and this power of increase should remain in being." Some discussion took place here in view of the agreed facts as to the effect on the position of the respondent of his father's death and testamentary disposition, and some slight efforts were made to work out this problem arithmetically. In the view I take of the case I need not pursue the subject. The respondent was and is a man of varied resources set off in some measure by various large commitments. He could, if the case required it, be ordered to secure in some way the large additional income for the petitioner which is demanded. What is to be determined though—in the exercise of a judicial discretion—is whether he should be ordered so to do. If the case had arisen under a judicial separation some difficult topics must have been further investigated, and among them these, what addition there really was to the resources of the respondent by virtue of his father's will, and to what extent and how this part of his means could at present be resorted to. The registrar thought on the whole the best course would be to make an order in favour of the petitioner not under s. 190, sub-s. 1, where the order is final, but under s. 190, sub-s. 2, when it is capable of enlargement. This commends itself to my judgment.

The question whether the respondent should be ordered to secure to the petitioner some gross annual sum of money under s. 190, sub-s. 1, of the statute, and not merely ordered to make periodical payments under s. 190, sub-s. 2, is not a simple one apart from the situation under the father's will. There are practical difficulties by reason of his actual position, the character of the possible security and the extent to which security which could be ordered and given would be of real advantage to the petitioner. The registrar had these things in mind as I suppose when he made his contingent recommendation as to periodical payments. He could not have made this suggestion if he had thought the case one for security. I accept his view.

As to the amount of periodical payments proposed to be ordered—namely, 750*l.* per annum payable monthly—I contrast this position with the 1257*l.* postulated on the one hand and the 473*l.* provisionally mentioned on the other. I have been impressed by the fact that under the separation deed executed by the parties in January, 1930, the husband was to pay to the wife during their joint lives while she should remain chaste and unmarried the yearly sum of 150*l.* in addition to the benefits taken by her under the marriage settlement. From the point of view of security 150*l.* per annum is not negligible. I note too that when the registrar's report was issued to the parties in July, 1932, notice of motion to confirm it was given on behalf of the petitioner. Bearing in mind the various facts on which I

1933

HORNIMAN
v.
HORNIMAN.

have laid stress it is, I think, manifestly proper that an order should be made in the terms proposed in the report, and I so decide.

Solicitors for the wife: *Halsey, Lightly & Hemsley.*
Solicitors for the husband: *Withers & Co.*

R. M. M.

Considered. LOESCHER *v.* DEAN.
[1950] 2 All E.R. 124.

HYDE *v.* WHITE.

WHITE *v.* HYDE.

1932
July 26.
1933
Feb. 21.

Applied. WIMBOURNE *v.* FINE
[1952] 1 Ch. 869

Probate Action—Intestacy—Interest of Next of Kin—Costs—Solicitor—Property Recovered or Preserved—Charging Order—Solicitors Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 69.

A party to a probate action propounded several wills of the deceased, being also interested as next of kin in the event of the intestacy of the deceased. The Court pronounced for an intestacy and against the wills. On the application of solicitors who had conducted the litigation for the party propounding the wills, and had since been discharged, the Court made an order declaring them entitled to a charge for their costs upon the interest of their client in the intestacy as upon " property recovered or preserved through their instrumentality."

CONSOLIDATED PROBATE ACTIONS.

Florence Hyde, the plaintiff in *Hyde* v. *White*, set up a will dated January 29, 1926, of Henry Benjamin White and alternatively an earlier will dated June 12, 1909, and as a further alternative a still earlier will of February 4, 1909. The defendant in the same action, W. A. T. White, pleaded to all three wills and claimed an intestacy as plaintiff in *White* v. *Hyde*, in which action Florence Hyde was the defendant. In the event of an intestacy Florence Hyde, in this report referred to as " the plaintiff," was entitled to share in the estate of the deceased as his lawful sister. The result of the litigation was that all three wills were set aside and an intestacy declared. The plaintiff had successively employed two firms of solicitors; in both cases she had withdrawn her instructions and failed to discharge bills of costs of the solicitors. Both firms had sued her on their bills and obtained judgment, but had been unable to recover. Subsequently an order had been made giving the solicitors, Messrs. Robinson & Allfree and Messrs. Wiley & Powles, leave to attend the trial and apply for charging orders on any interest the plaintiff might take as a result of the litigation.

A. Richard Ellis (with him *H. Clifford Mortimer*) for the solicitors. The solicitors are entitled to a charge for their costs on the interest of the plaintiff in intestacy. The Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28, repealed by the Solicitors Act, 1932 (22 & 23 Geo. 5, c. 37), and re-enacted by s. 69 of the same Act, applies to probate actions (*Heap* v. *Jackson* (1)), and gives the solicitors a right to a charge upon property recovered or preserved through their instrumentality. No doubt could arise if the interest proposed to be charged was created by a will pronounced for (*Ex parte Tweed* (2)), and we submit that the share of the estate to which the plaintiff is entitled by reason of the intestacy declared as the result of the litigation is in the same position as a legacy would be under any will pronounced for. The circumstance that the solicitors were discharged before trial is immaterial. Their right had accrued: *In re Wadsworth. Rhodes* v. *Sugden.* (3)

[He also referred to *Faithfull* v. *Ewen* (4) and *Knight* v. *Gardner.* (5)]

The plaintiff Florence Hyde did not appear, and was not represented.

[There were numerous parties to the probate actions who were represented at the hearing on the general merits, but took no part on the application for a charging order, on which point alone the case is reported.]

THE PRESIDENT (LORD MERRIVALE). An application was made under the Solicitors Act, 1932, s. 69, that the Court

(1) (1886) W. N. 192.
(2) [1899] 2 Q. B. 167.
(3) (1885) 29 Ch. D. 517.
(4) (1878) 7 Ch. D. 495.
(5) [1892] 2 Ch. 368.

1933

HYDE
v.
WHITE.
WHITE
v.
HYDE.

The President.

should declare the solicitors who have acted for the plaintiff entitled to a charge on the interest in the estate of the deceased to which the plaintiff is now entitled by reason of the finding of the Court that there is an intestacy. [The learned President read s. 69 of the Solicitors Act, 1932, and continued :] No difficulty arises by reason of the fact that the plaintiff changed her solicitors. If they had remained her solicitors down to the date of the decree that has been pronounced to-day that would not have enlarged any right they have to costs, and if they are entitled to-day, they are no less entitled, although they no longer represent the plaintiff. The real question is whether the section gives a charge on the interest of the plaintiff which has now been ascertained, and whether there is such a charge by reason that that interest is property which has been recovered or preserved through the instrumentality of her solicitors. If one takes a superficial view it can be said that the plaintiff has been unsuccessful in the claim she made under any of the wills. It may be said, therefore, that since she has failed all along the line there has been no property preserved or recovered. On the whole I do not think that this is the true view. The statute must be construed with reference to various classes of litigation. This is a Court of Probate. The property in question is the estate of Henry Benjamin White, who is dead, and it has not previously been vested by any judicial or administrative act in any other person. There were persons who had inchoate rights in it and one of the persons who had those rights was his sister, the plaintiff, who had issued a writ " In the estate of Henry Benjamin White " in the Probate Division. She claimed in certain specific modes. She claimed so much of the estate as was disposed of in her favour under a will of 1926 and in the alternative under two wills of 1929 and those claims failed, but there still remained the question what her interest was in the estate of Henry Benjamin White, and that was an inchoate interest until there was some effective order of the Court. That was the position until that right had been ascertained. In these circumstances I do not think that a merely narrow construction must be put on the words of the section but that they must be read with regard to the intention of the Legislature. I think that this is a property which has been preserved, that is to say, that has been secured to the plaintiff in these proceedings. I therefore think that her solicitors are entitled to charging orders for their costs properly incurred on her behalf in the litigation.

Order that the costs incurred by the solicitors employed by the plaintiff be declared to be charged on the share of the estate to be received by the plaintiff by virtue of the declaration of intestacy.

Solicitors: *Lovell, Son & Pitfield, for Robinson & Allfree, Ramsgate; Wiley & Powles.*

R. M. M.

THE HUMOROUS.

THE MABEL VERA.

1933
Jan. 24, 25.

Shipping—Mortgage—Fishing Vessels and their "Appurtenances"—Drift Nets and Gear—Appropriation.

The mortgage of 64/64th shares in a fishing vessel and her "appurtenances" will include fishing nets appropriated to her at the time of the mortgage or subsequently put on board in substitution of those appropriated to her at the time of the mortgage; but, if there were then no nets on board appropriated to her, nets found on board or in store when the mortgagee takes possession, even if appropriated to her, will not pass under the mortgage.

The defendants mortgaged to the plaintiffs two fishing vessels, the *H.* and the *M. V.* and their "appurtenances." At the time of the mortgage the *H.* had no drift nets on board appropriated to her. When the plaintiffs took possession of her under the mortgage she had a miscellaneous lot of nets on board, of which 34 were marked with her number. The *M. V.* at the time of the mortgage had on board 100 nets not marked with her number but which had been bought for her, and of these 93 were on board at the date of seizure. In addition to the nets found on each of the vessels the plaintiffs claimed a number of nets found in store, some with the *H.'s* number on them and some with the *M. V.'s* number:—

Held, that the only nets which had been appropriated to either vessel, and, therefore, which passed under the mortgages, were the 93 found on board the *M. V.*

MORTGAGE ACTIONS tried together.

The plaintiffs in each case were Peacock & Co. (Lowestoft), Ld.; the defendants were respectively, "the owners of the steam drifter *Humorous* and her appurtenances" and "the owners of the steam drifter *Mabel Vera* and her appurtenances." Both vessels were in fact owned by the Hollinghurst Fishing Co., Ld.

By mortgages dated February 3, 1926, and April 7, 1928, respectively, and duly registered in accordance with the Merchant Shipping Act, 1894, the defendants mortgaged to the plaintiffs 64/64th parts in the *Humorous* and *Mabel Vera*, belonging to the port of Lowestoft, and in their boats, guns, ammunitions, small arms and appurtenances to secure an account current between the plaintiffs and the defendants.

The plaintiffs alleged that there was due and owing to them under the account current the sum of 2706*l.* 16*s.*

The appurtenances of the two vessels, according to the plaintiffs, included a quantity of fishing gear and tackle which belonged to the vessels respectively at the date of the mortgages and/or had been provided in substitution for other fishing gear and tackle of a like nature which belonged to them at the date of the mortgages.

The plaintiffs alleged that the fishing gear and tackle belonging to and appropriated to the two vessels respectively comprised (inter alia): (*a*) On board the *Humorous*, 86 herring nets, and on board the *Mabel Vera*, 93 herring nets; (*b*) On shore in the defendants' stores, 68 herring nets marked with the number of the *Humorous* and 147 herring nets marked with the number of the *Mabel Vera.*

The plaintiffs claimed in each case: 2706*l.* 16*s.* together with interest; judgment for the validity of the mortgage; a declaration that the fishing gear and tackle alleged to be appropriated to the respective vessels was "appurtenant" to them, and was included under the mortgages; and an order for the appraisement and sale of the vessels and of the fishing gear and tackle save in so far as it had already been sold.

The defendants admitted the mortgage debt, but denied that the appurtenances of either vessel included any of the fishing gear or tackle referred to, or that any part of it belonged to the respective vessels at the dates of the mortgages or thereafter, or was or became included in the mortgages.

The facts are set out in the judgment.

Alfred Bucknill K.C. and *Willmer* for the plaintiffs. The plaintiffs are entitled to all the nets and gear claimed. The legal position on the authorities is that nets which can be said to have been appropriated to a particular ship, or nets substituted for the original nets, pass under a mortgage of the ship as part of her appurtenances, and nets and gear found on board or in store with the number of a particular vessel stamped on them is the best evidence that they have been appropriated to that vessel: see *The Dundee* (1); *Gale* v. *Laurie* (2); *Coltman* v. *Chamberlain* (3); *Hull Ropes Co.* v. *Adams.* (4) In *Armstrong & Co.* v. *M'Gregor & Co.* (5) the Lord President said: "It has been said in the course of the argument that nothing can be said to belong to a ship unless it is specifically appropriated or devoted to that ship, and even that it would be necessary to have the ship's name on it. I cannot entertain that idea as a reasonable one. Things may belong to a ship which might be used just as well in any other ship. There are many small things belonging to a ship which may be transferred from one to another . . . .": see also *In re Salmon and Woods* (6), where the evidence of appropriation was insufficient.

W. Norman Raeburn K.C. and *H. L. Holman* for the defendants. It is not disputed that nets may be "appurtenances," but the mere facts that nets and gear were found on board is not sufficient to pass them under the mortgages. The only issue is whether at the time the mortgages were granted they did or did not cover certain appurtenances already appropriated to the respective vessels. As regards the *Humorous* the evidence shows that she borrowed nets as and when she needed them. At the time of the mortgage she was a trawler and not fitted for drift net fishing and had no drift nets at all. This is fatal to the plaintiffs' claim, for after-acquired property only passes under a mortgage if in substitution for property already appropriated to the vessel at the time of the mortgage. The mortgage of a fishing vessel is quite different from the mortgage of a house in which fixtures may be built. As regards the *Mabel Vera* 100 nets were on board at the time of the mortgage, but they were marked "G. B.," and the evidence is insufficient to show that they were "appropriated" to that vessel, for subsequently 50 others were bought and marked with her number and at the time of seizure 93 nets only were on board: see *In re Salmon and Woods* (6), which is the nearest reported case on the facts.

(1) (1823) 1 Hagg. Adm. 109.
(2) (1826) 5 B. & C. 156.
(3) (1890) 25 Q. B. D. 328.
(4) (1895) 65 L. J. (Q. B.) 114.
(5) (1875) 2 R. 339, 341.
(6) (1885) 2 Morr. 137.

As regards the nets and gear in store the evidence is that they were variously marked and used indiscriminately for any vessel that wanted them, and none were on board or appropriated to either the *Humorous* or the *Mabel Vera* at the time of the mortgages.

Bucknill K.C. in reply. The evidence of appropriation is the marking. The nets claimed which were in store were marked with the appropriate number of one or other of these vessels.

[BATESON J. When you took the *Humorous* as your security she was a trawler. How can you claim nets acquired afterwards ?]

The managing director of the company, Mr. Breach, allowed his nets to be on board ; they were in the apparent ownership of the company, which is entirely confined to the Breach family.

[BATESON J. "Apparent ownership" might be a good answer in bankruptcy proceedings, but it does not touch this question.]

BATESON J. These two cases have been tried together. The facts appear to be as follows: The company which owned the two vessels was formed in January, 1926, by Mr. George Breach, whose son, Mr. George A. Breach, gave evidence before me. Mr. Breach, the father, who died since the purchase of these vessels, owned some fishing vessels and a quantity of nets. He bought the *Humorous* in 1925 for 2240*l.* She was a drifter trawler, and had her trawl gear upon her, but no fishing nets for drifting purposes. Her number was L. T. 691. The company, when it was formed, owned no nets for drift fishing at all. The vessel was bought with the intention of turning her over to the company which was formed in January, 1926, the Hollinghurst Fishing Co., Ld., and very soon after she was purchased—namely, in February—she was mortgaged to the plaintiffs.

There has been a good deal of discussion as to whether, at the time of the mortgage, the vessel had any nets on board her at all, and whether such nets as she had were appropriated to her. She may have had some on board which belonged to Mr. Breach, the father, who had lent them, or hired them, to her for a possible net drift voyage about that time, but that she had any which were appropriated to the vessel I am satisfied is not the case. Therefore, the mortgage to the plaintiffs of the *Humorous* was only a mortgage which covered the vessel herself and her trawl gear which was undoubtedly on board her, and I think that if the mortgagees had wanted to cover any nets at all they should have ascertained the facts before advancing their money—which they did not do.

The books have been referred to and it appears that the first nets were bought by the company on March 6, 1928. On March 14, 1928, the *Mabel Vera* was bought. She was only a drifter, not a trawler drifter. She was bought at auction for 1600*l.* without nets. On April 5 the company bought some 220 second-hand nets at a cost of 870*l.*, and they were marked, for some reason, "G. B.," the initials of Mr. Breach, the father. Of those nets 120 were stored and 100 were put on board the *Mabel Vera*, and I think the latter were appropriated to her. On April 7 the mortgage for the *Mabel Vera* was entered into—the mortgages for both ships were in statutory form and covered 64/64th shares in the ships and their appurtenances—and I am satisfied that, in the case of the *Mabel Vera*, she had 100 nets appropriated to her at the time of the mortgage.

Various nets were bought from time to time—new nets—the number varying in the different years. In December, 1931, a liquidator for the company was appointed, and on December 14 and 15 the mortgagees took possession of both vessels under their mortgages, and took the gear that they found on both of them and stored it in their store.

The gear that was found on board the two ships is set out in an inventory. In the case of the *Mabel Vera* (whose number was 1185) there were found 93 nets marked with the number 1185, with other gear attached to the vessel, including ropes and trunks—the latter marked with the number 1185—and also a number of warps. The buoys which she had on board were a miscellaneous lot, most of them being marked "H," which, I understand, represents the name of the company, and the few odd ones had different marks, only one having the figures 1185 on it. It seems to be clear that the *Mabel Vera* had her own nets and the company's buoys and trunks and the other gear obviously appropriated to her.

The *Humorous*, on the other hand, had a miscellaneous lot. Her number was 691. She only had 34 nets with that number; she had 24 nets with the mark "G. B." Some were those which were purchased in April, 1928. There were 12 with the *Mabel Vera's* mark, 1185. There were 14 of another vessel called the *Kipper*, which belonged to Mr. George Breach, marked iiii.; there was no mark on one. It seems to me clear that the *Humorous* was furnished from the store which contained some of Mr. Breach's property and some of the Hollinghurst Company's property (Mr. Breach's property being realized after his death for the benefit of his estate); most of her buoys bore the company's mark "H," but some were without any marks at all, and in addition there were the necessary warps and ropes which could not be marked. That supports the view that the *Humorous* was supplied from store with what she might want for any particular voyage and that she had not any drifter gear at all really appropriated to her. The writs were issued on April 6, 1932; since then the gear has all been sold and has realized in round figures 162*l.* in the case of the *Humorous* and 170*l.* in the case of the *Mabel Vera.* In addition to this gear that was taken off the ship there was a good deal of gear in the store—gear with all sorts of marks on it—and Mr. Bucknill for the mortgagees claims all gear that was on the ships when they were seized as well as all gear with the specific mark of the particular ships which was in the store. I do not think that he is entitled to all that. I think he is entitled to the ships and the gear that was on board in substitution of the gear that was there originally when the *Mabel Vera* was mortgaged.

There is really no doubt about the law in this case. Mr. Raeburn and Mr. Bucknill agreed that the real result of the cases is that the nets which can be said to be appropriated, and anything substituted and appropriated for maintaining the position of the original gear, passed under the mortgage as "appurtenances." The cases that have been cited were: *The Dundee* (1); *Gale* v. *Laurie* (2); *Armstrong & Co.* v. *M'Gregor & Co.* (3); *In re Salmon and Woods* (4); *Coltman* v. *Chamberlain* (5); and I have been furnished with a transcript of the judgments which is more extensive than the reported judgments in *Hull Ropes Co.* v. *Adams.* (6)

In my view, although the marking of a lot of this gear has the same number as have the ships, I think the real effect of the evidence is that the company marked the number of a particular ship indiscriminately when they were renewing gear. It did not necessarily mean that that gear was to go to that ship, because very often one ship wants one sort of gear and another ship wants other gear, and it does not follow in the least that that gear is earmarked specially to that ship.

In the case of the *Humorous* I am satisfied that she took what she got out of the general store from time to time without anything being appropriated specially to her. Certainly no nets had been appropriated to her at the time when the mortgage was entered into, and I do not see, even if there was any appropriation of any special gear to her afterwards, how that would pass under a mortgage made before the gear was ever allotted to her, nor do I see how you can mortgage property which you do not possess or which does not belong to you. That disposes of the claim with regard to the *Humorous.*

With regard to the *Mabel Vera* I think the position is different. She had, at the time of the mortgage, a set of nets of 100 on board which were meant for her; I think they were bought for her; and what she had when she was taken

(1) 1 Hagg. Adm. 109.
(2) 5 B. & C. 156.
(3) 2 R. 339.
(4) 2 Morr. 137.
(5) 25 Q. B. D. 328.
(6) 65 L. J. (Q. B.) 114.

possession of by the mortgagees were merely nets in substitution for those nets and, therefore, they pass under the mortgage. What was in the store, I think, did not belong to any particular ship and could be given out to whichever ship they chose, or could be hired out to any other ship. What the quantity was in the store I am not so sure about, but it is said there were 252 nets belonging to, or marked for, the *Mabel Vera*, and 102 for the *Humorous*—again pointing to the fact that the *Humorous* was not by any means a fully equipped drifter vessel if they all were appropriated to her—I do not think that they were.

In addition to those nets there were a good many others, I gather, with altogether different marks, so that it is quite obvious the company had a great deal more gear than was necessary for two ships. The truth is that the company owned ships and they owned nets and gear, and what they mortgaged were the ships and only such appurtenances as were actually appropriated to the ships. I hold, therefore, that the gear in store was not appropriated to any particular vessel and, therefore, the plaintiffs fail upon that point.

That means in the case of the *Humorous* I give judgment for the plaintiffs for 2706*l.* with interest from the date of the writ; judgment for the validity of the mortgage; and an order for the appraisement and sale of the *Humorous*, with leave to the plaintiffs to bid.

In the case of the *Mabel Vera*, judgment for 2706*l.*, together with interest from the date of the writ. Both mortgages covered the same account current, however, and the plaintiffs, of course, cannot have the 2706*l.* twice over. Judgment for the validity of the mortgage; an order for appraisement and sale of the *Mabel Vera*, with leave to the mortgagees to bid; and judgment for 177*l.* 18*s.* 6*d.* realized by the sale of her gear that was taken off her.

Solicitors for the plaintiffs: *Botterell & Roche, for Norton, Peskett & Forward, Lowestoft.*

Solicitors for the defendants: *Pritchard & Sons, for Wiltshire, Sons & Jordan, Great Yarmouth.*

E. C. M. T.

NEWTE *v.* NEWTE AND KEEN.

1933
Feb. 20.

Divorce—Settlement—Power to alter Order for Variation of Settlement.

The Court has power to review an order for variation of settlement by reason of facts existing at the date of its order but not brought to its notice at the time.

Gladstone v. *Gladstone* (1876) 1 P. D. 442 and *Benyon* v. *Benyon* (1890) 15 P. D. 29, 54 distinguished.

Motion by the wife for further variation of a marriage settlement after dissolution of the marriage at the suit of the husband.

The decree was made absolute on June 25, 1917. There was no living issue of the marriage. By a post-nuptial settlement dated September 2, 1898, the respondent wife had brought property into the settlement which gave her the first life interest. There was also a covenant by the petitioner to bring after-acquired property into settlement on trust for himself for life with a second life interest to the respondent. Under this settlement the respondent had an absolute interest in her settled funds in the event only of her surviving the petitioner, and in the event of her predeceasing the petitioner a general power to appoint by will, and in default of its exercise the ultimate destination of her settled funds was to her next of kin as if she were intestate and without a surviving husband.

The petitioner filed a petition for the variation of the settlement, and on July 29, 1918, the Court varied it by releasing the petitioner from his covenant to settle after-acquired property and extinguishing his power of appointing new trustees, but by inadvertence no application was made to have the settlement read as if the petitioner were dead so as to give the respondent an absolute interest in her trust funds, whether she survived the petitioner in fact or not.

On June 27, 1918, the respondent had executed a further settlement which was in form a settlement in contemplation of her then intended marriage (which took place on June 29, 1918) to the co-respondent in the suit. By this settlement she covenanted with the trustees of it that immediately after the said marriage she would appoint to them by will

1933

NEWTE
v.
NEWTE
AND
KEEN.

her trust funds comprised in the original settlement, and it was provided that at the expiration of twenty years the respondent might revoke the further settlement, after which revocation the trust funds should be held for the respondent absolutely.

On July 29, 1918, the petitioner was unaware of the existence of the further settlement, and it was not brought to the notice of the Court. The respondent being now advised that unless she survived her first husband she had no absolute interest in the settled funds which she had dealt with in the further settlement, and being desirous of exercising the provision contained in the further settlement for its revocation on or after June 27, 1938, now moved for a further order that the original settlement of September 2, 1898, should be read as if the petitioner were dead and had died in the lifetime of the respondent. The petitioner filed an affidavit stating that it was his intention at the date of the order for variation that the respondent should be conceded the further variation that she now asked for.

F. L. C. Hodson (with him *S. E. Karminski*) for the respondent. The Court has refused to entertain an application for a further order on the ground of what has happened since the date of the original order: *Gladstone* v. *Gladstone* (1); *Benyon* v. *Benyon.* (2) This case is distinguishable. It is one of mistake at the time of the order: *Arkwright* v. *Arkwright.* (3) The Court was not in possession of the then existing facts. *Taylor* v. *Taylor* (4) is distinguishable. In that case, on the happening of an event thirty-four years after the order, the Court refused to rectify an omission of substance, which was acquiesced in at the date of the order.

King-Farlow for the petitioner consented.

The Court (LANGTON J.) made an order as prayed.

Solicitors for the petitioner: *Godden, Holme & Ward.*
Solicitors for the respondent: *Walters & Co.*

(1) 1 P. D. 442.
(2) 15 P. D. 29, 54.
(3) (1895) 73 L. T. 287.
(4) (1926) 161 L. T. Jo. 236.

R. M. M.

THE ST. JOSEPH.

1933
Feb. 10, 13,
28.

Shipping—Bill of Lading—Damage to Cargo—Conflict of Laws—Hague Rules—Belgian Code de Commerce, art. 91*—Norwegian Ship—Guatemalan Consignees—Antwerp Shipment.*

A French firm of aeroplane manufacturers sold to the plaintiffs, the Government of Guatemala, certain aeroplanes and other goods. Under the contract of sale payment was to be made as to 67 per cent. before the goods were shipped and the balance by opening a credit with a bank in Guatemala. The French sellers, by their agents in Antwerp, chartered the *St. Joseph*, a Norwegian vessel owned by the defendants, for the transport of the goods, and they were shipped at Antwerp under bills of lading in which the plaintiffs' name was inserted as consignees. One set of the shipping documents, including the bill of lading, was sent to the bank, and on the arrival of the ship in Guatemala the bank handed the bill of lading to the plaintiffs. The plaintiffs presented it to the ship and received the goods, which were found to be damaged.

The defendant shipowners admitted liability, but contended that the contract was governed by Belgian law and that their liability was limited by art. 91 of the Belgian Code, which, embodying the provisions of the Hague Rules, provides that "A negotiable bill of lading issued for the transport of goods by any ship of any nationality soever departing from or destined to a port of the Kingdom . . . . is governed by the following rules . . . . : (iv.) 5. Neither the carrier nor the ship shall in any event be held responsible for loss or damage caused to . . . . goods for a sum exceeding 3500 belgas or 17,500f. per package or unit unless the nature and the value of such goods has been declared by the shipper before shipment and this declaration has been inserted in the bill of lading." The bill of lading contained no reference to the Hague Rules or art. 91, and neither Norway nor Guatemala had adopted the Rules:—

Held, that the property in the goods passed to the plaintiffs after inspection in France and not by consignment under the Bills of Lading Act; that the bill of lading was a mere receipt; and that the contract between the plaintiffs and the defendants was not governed by Belgian law.

The Torni [1932] P. 27 and 78 distinguished.

DAMAGE TO CARGO.

The plaintiffs were the owners of cargo lately laden on board the Norwegian steamship *St. Joseph*; the defendants were the owners of the *St. Joseph*. The case was tried upon an agreed statement of facts as follows:—

The plaintiffs, the Government of the Republic of Guatemala, by a contract dated January 15, 1929, and made between the plaintiffs and a French firm of aeroplane and munition manufacturers, styled the Office General de l'Air, agreed to buy and the latter agreed to sell certain aeroplanes, equipment, and munitions of war. By a supplemental contract dated February 26, 1929, the Office General de l'Air undertook, in consideration of the payment by the plaintiffs of a lump sum over and above the contract price, to pack and insure the goods, to obtain the necessary permits from interested Governments, and to carry out all the operations of loading, discharging at Puerto Barrios and conveyance to Guatemala City.

On April 30, 1929, a charterparty was entered into at Antwerp between the defendants, the owners of the steamship *St. Joseph*, and the Agence Maritime Jean Smeets, of Antwerp, as agents for the sellers, for the conveyance of the aeroplanes, etc., by the *St. Joseph* from Antwerp to Puerto Barrios. The plaintiffs' goods were duly shipped at Antwerp by the sellers' agents under a bill of lading issued at Antwerp, dated May 19, 1929, and consigned to the plaintiffs at Puerto Barrios. The bill of lading gave particulars of the contents of the cases loaded but did not specify their value, nor was such value declared by the shippers to the defendants before shipment.

The *St. Joseph* left Antwerp on May 19 and, after loading patent fuel at Swansea, reached Puerto Barrios on July 2, 1929. The discharge of the plaintiffs' goods was completed on July 5, and on examination by the plaintiffs' agents the goods were found to be seriously damaged owing to the bad stowage of the part cargo of patent fuel at Swansea.

Before the goods were shipped on board the *St. Joseph* it was agreed between the sellers, the Anglo-South American Bank, and the Minister for Guatemala in Paris, as agent for the plaintiffs, that the bills of lading covering the shipment should be made out direct to the order of the plaintiffs. Three sets of shipping documents were made out, and two of them were forwarded by the sellers to the Paris branch of the Anglo-South American Bank with instructions that on the arrival of the *St. Joseph* at Puerto Barrios one set should be handed to the plaintiffs. A third set was handed on behalf of the sellers to the master of the *St. Joseph* in a sealed envelope addressed to the Guatemala City branch of the Anglo-South American Bank, with instructions to forward it to the addressees as soon as the *St. Joseph* arrived at Puerto Barrios. The object of this arrangement was to ensure that the bank, with whom the plaintiffs had opened a credit to provide payment for the goods, might be in a position, on the arrival of the *St. Joseph*, to hand one complete set of documents to the plaintiffs. It was further arranged between the sellers and the bank that, on delivery of the goods to the plaintiffs at Puerto Barrios, the bank should, out of the credit opened by the plaintiffs with them, pay to the sellers the balance of the sum due for the goods under the contracts less a sum of $550, the estimated cost of forwarding the goods from Puerto Barrios to Guatemala City. On the arrival of the *St. Joseph* at Puerto Barrios the bank handed to the plaintiffs one set of the shipping documents, including the bill of lading. The plaintiffs presented the bill of lading at Puerto Barrios and took delivery of the goods at Puerto Barrios thereunder.

The shipowners admitted liability for the damage, but contended that the amount of their liability was limited by Belgian law, which embodied the Hague Rules in art. 91 of the Code de Commerce, an article of August 21, 1879, replaced by the following provisions made November 28, 1928: "(A) A negotiable bill of lading issued for the transport of goods by any ship of any nationality soever departing from or destined to a port of the Kingdom or the Colony is governed by the following rules:—Article IV. (5.) Neither the carrier nor the ship shall in any event be held responsible for loss or damage caused to or in connexion with goods for a sum exceeding 3500 belgas or 17,500f. per package or unit unless the nature and the value of such goods has been declared by the shipper before shipment and this declaration has been inserted in the bill of lading." Art. I. (B) provided that "contract of carriage applies only to a contract of carriage evidenced by a bill of lading or by any similar document of title for the carriage of goods by sea;

it applies also to a bill of lading or similar document issued by virtue of a charterparty from the moment when this document governs the relations between the carrier and the holder of the bill of lading." Under (B) it is provided that "any bill of lading issued under the above conditions shall contain a statement that it is governed by the Rules of Article 91."

Sir Robert Aske for the defendants. The contract is governed by Belgian law. The bill of lading was issued in Antwerp, the goods were shipped there and the charterparty signed there by the Belgian agents of both the shipowners and the French sellers. This is a much stronger case on the facts than *The Torni* (1), where Langton J. and the Court of Appeal held, in the case of a shipment from Jaffa, that in spite of an express term in the bill of lading that English law should apply, the contract was governed by Palestine law, and that a Palestine Ordinance embodying the Hague Rules applied. The provisions of the International Convention are the overriding consideration: see the observations of all the Lords Justices in *The Torni* (1), and all parties to the Convention intended shipments under bills of lading to be subject to its provisions. The Belgian Code says "governed by," the Palestine Ordinance says "deemed to have effect." As soon as the bill of lading left the hands of the shippers it constituted a contract between the shipowners and the persons to whom it was handed or sent. The sellers preserved the jus disponendi, the balance of the purchase price had to be paid in Guatemala, and the plaintiffs could only obtain their goods by the draft on the South American bank against the documents; they were consignees within the meaning of s. 1 of the Bills of Lading Act, 1855.

W. N. Raeburn K.C. and *G. St. C. Pilcher* for the plaintiffs. Belgian law does not enter into the contract. The property in the goods had passed to the plaintiffs before shipment. The contract between the plaintiffs and the defendants was made in Guatemala, not in Belgium, and was an implied contract that if the ship handed over the goods the plaintiffs would be bound by the express terms of the bill of lading and no more: see *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co.* (1), and that document contained no reference to Belgian law or the Hague Rules. The goods were not shipped under the bill of lading but under the charterparty entered into between the sellers and the defendants; that was the only contract of shipment, and the Belgian Code has no application to it: see Scrutton's Charterparties and Bills of Lading, 13th ed., art. 3, p. 10. The bill of lading was merely a receipt, it was never negotiated. The shippers only parted with the bill of lading to enable the plaintiffs to get the goods out of the ship, so that they, the shippers, could forward them to Guatemala City, as provided in the contract. In *The Torni* (2) there was no charterparty, the only contract under which the goods were shipped was the bill of lading. Both Courts in that case attached great importance to the words in the Ordinance "deemed to have effect"; no such words occur in the rules in any other country or colony. Further, the words in the Ordinance are "every" bill of lading, whereas in the Belgian Code the words are "every negotiable" bill of lading.

---

(1) [1932] P. 27 and 78.

Sir Robert Aske in reply. The retention of the document shows that the property did not pass until the whole of the purchase price had been paid: see *The Kronprinsessan Margareta* (3); *The Annie Johnson* (4), and the bank in Guatemala only parted with the buyers' money on production of the bill of lading—i.e., cash against documents.

[BATESON J. No, under the contract the sellers had to deliver in Guatemala City, not at Puerto Barrios, the port of discharge.]

It is immaterial whether the property had passed or not: see the observations of Langton J. in *The Torni* (2), and the Court of Appeal, although they held there was insufficient evidence on which to decide the question as to the position

(1) [1924] 1 K. B. 575.
(2) [1932] P. 27 and 78.
(3) [1921] 1 A. C. 486.
(4) [1918] P. 154, 161.

of the receivers of those portions of the cargo which did not pass on indorsement of the bills of lading, did not dissent from those observations. The bill of lading regulates the relation of parties under Belgian law—as in English law—from the time it gets into the hands of third parties; in this case third parties, the plaintiffs, were named as consignees, and the bill of lading left the hands of the shippers after the ship reached Puerto Barrios; s. 91 of the Code expressly provides for this particular matter.

Cur. adv. vult.

Feb. 28. BATESON J. read the following judgment. In my judgment the plaintiffs are right in this case. The plaintiffs are the Government of Guatemala. The defendants are Norwegian shipowners. The action is brought by the plaintiffs to recover for damage done to certain cargo carried by the defendants in the steamship *St. Joseph.* The defendants admit liability, but say that their liability is limited by Belgian law to some 100*l.* a package. The only questions are: (i.) What was the contract between the plaintiffs and defendants? (ii.) Does Belgian law apply to it?

The facts are set out in an agreed statement of facts, and I need not repeat them in detail. Shortly, they are that on January 15, 1929, the Government of Guatemala, through their Minister in Paris, bought certain aeroplane goods from French suppliers in Paris under a contract of sale which was entered into between them. Under section I. (*b*) of the contract the goods were to be accepted by the Government of Guatemala before departure from the sellers' works after being passed by Bureau Veritas or an expert. Under section I. (*c*) of the contract payment was to be made as to 34 per cent. cash with the order and the balance, 66 per cent., by a confirmed irrevocable credit with a first-class bank within five days of the signing of the contract.

The 66 per cent. was releaseable to sellers as to 33 per cent. on taking away the goods against a certificate of acceptance and the other 33 per cent. was payable at Guatemala City by the bank's correspondents against the shipping documents not later than eight days after the arrival of the goods at Guatemala City. The Anglo-South American Bank was the bank with which the credit was opened.

The sellers undertook the transport by rail and the affreightment to Guatemala City via Puerto Barrios. They also undertook to contract for the account of the Government of Guatemala the insurance against all risks. The transport and insurance was the subject of a supplemental contract of February 26, 1929. By this later contract the insurance was to be from eight days after the acceptance of the goods in the works until eight days after arrival at Guatemala City. The transport was to be effected by the sellers, who had to arrange for the loading of the goods, the discharge at Puerto Barrios, and the forwarding to Guatemala City. Puerto Barrios is some 100 miles or so from Guatemala City. The sellers also undertook to send a specially qualified representative who should receive the goods at Puerto Barrios, forward them to Guatemala City and effect delivery to the Government. The Government of Guatemala for these transport services agreed to pay a lump sum of $80,520 in four sums, two of 30 per cent. and two of 20 per cent., the last payment being after forwarding the remainder of the supply.

The French sellers by their agents in Antwerp chartered the *St. Joseph* from her owners in Oslo through the owners' agents in Antwerp for the transport of a part of the goods. The charter was dated April 30, 1929, it was in English, and under it the vessel was to load these goods at Antwerp. The freight of 800*l.* was payable in advance and the goods were to be delivered at Puerto Barrios in Guatemala. The ship loaded the goods at Antwerp and sailed on May 19, 1929. Bills of lading dated May 19, 1929, were made out, mostly in English, except that the description of the goods and details of them were in French. The shippers were Messrs. Valcke & Co., a French firm in Paris, according to a stamp on the bill of lading. The goods were to be delivered to the Government of Guatemala and the words "Gouvernement de Guatemala" are in French—"or to his their assigns"—"paying freight for the said goods as per charterparty dated Antwerp 30th April 1929." The bill of lading was initialed "J. C.," which I understand are the initials of the master, and the only bill of lading that I have seen has printed on it in large type "Copy not negotiable." The bill of lading ends with "In witness whereof the undersigned master or agents of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which being accomplished, the others to stand void."

The bill of lading which is with the agreed statement of facts is not indorsed. The purchaser's name was inserted in the bill of lading as being the consignees. The making out of the bill of lading direct to the order of the plaintiffs was done in accordance with an arrangement between the Minister of Guatemala, the sellers and the bank. This arrangement is referred to in a letter dated May 24, 1929, from the sellers to the bank, and says that on arrival of the goods at Puerto Barrios the bank should remit them to the Government of Guatemala, and should pay over the balance due less a sum for transport to Guatemala City as soon as the goods were delivered at Guatemala City. The sentence in that letter, "It is understood that immediately after the arrival of the goods at Puerto Barrios you will remit these to the Government of Guatemala," means "You, the bank, will remit these goods," the gender of the French words in the original making it clear that the word "these" refers to goods, and not to the bill of lading.

The documents consisted of detailed lists of the consignment, the invoice relating to the goods loaded, the certificate of insurance, and the bills of lading, which were made out in triplicate. On May 24 two complete sets were sent by the sellers to the Paris branch of the bank with instructions to forward the documents to the Guatemala branch urgently to avoid delay in delivery of goods. One set was handed to the master of the *St. Joseph* in a sealed envelope addressed to the bank at Guatemala City, the master being directed to get it to the bank as soon as he arrived at Puerto Barrios, so that the bank might remit the goods to the Government of Guatemala, stopping out of the credit $550 in order to pay the cost of the railway freight from Puerto Barrios to Guatemala City. The bill of lading contained no reference to the Hague Rules or to art. 91 of the Belgian Code which embodies those Rules.

The ship after leaving Antwerp went to Swansea and loaded the remainder of her space with patent fuel. She then went to La Guaira, delivered the patent fuel, and thence to Puerto Barrios, where she arrived on July 2 and delivered the cargo loaded at Antwerp. This cargo was found to be damaged by the bad stowage of the patent fuel to the extent of some 5000*l.* The plaintiffs, who had been given a bill of lading by the bank at Guatemala City, obtained the goods from the ship and they were sent by rail to Guatemala City. The agreed statement says that the bank handed to the plaintiffs one complete set of documents, including a bill of lading. The plaintiffs presented the bill of lading to the ship and obtained delivery of the goods thereunder. The bill of lading has no indorsement on it.

The main question debated before me was whether Belgian law applies to the relations between the Government of Guatemala and the Norwegian shipowner. Mr. Raeburn says "No." Sir Robert Aske says "Yes." I agree with Mr. Raeburn. Sir Robert Aske says the property in the goods passed to the plaintiffs under the bill of lading by reason of the consignment; that the bill of lading was made in Belgium by a Belgian shipper under a charterparty between Belgians and, therefore, the place where the contract by bill of lading was made was Belgium and Belgian law governs it. Under Belgian law, which includes the Hague Rules, the shipowners' liability is limited. Mr. Raeburn says the property did not pass by reason of the consignment. It was the plaintiffs' property before it was shipped. The plaintiffs' only contract with the defendants was in the express terms of the bill of lading which they got in

Guatemala; it contains nothing about Belgian law. The law of that country has nothing to do with it. Neither charterparty nor bill of lading was made by Belgians nor were the shippers Belgians.

The first question to be considered is, I think: What is the contract between the plaintiffs and defendants? It is made by the plaintiffs offering the bill of lading to the defendants and getting delivery of the goods covered by the bill of lading. That is the only contract. It is a contract between the Government of Guatemala and the Norwegian shipowner and made in Guatemala. No Belgian had anything to do with the business except as agents. The charterparty was between a Frenchman and a Norwegian; the bill of lading related to a shipment by a Paris firm as agents for the French sellers, and was initialed by the master of the Norwegian ship. The only thing Belgian about it is the word "Anvers" and the shipment in Antwerp. The Government of Guatemala are not consignees or indorsees within the Bills of Lading Act, because they got no property by the consignment or by any indorsement. The goods were their property by reason of their contract with the French sellers: the sellers had to deliver the goods at Guatemala City. The Government of Guatemala merely presented the bill of lading and got delivery and are bound by the terms contained in the bill of lading and no more: *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co.* (1) I do not think a term of Belgian law can be imported into such a contract between such parties in a case where no reference is made to Belgian law in the contract, and where there is nothing to show that either party intended or contemplated that Belgian law had anything to do with the contract. The Guatemalan Government never agreed to the Belgian law being a term. It cannot be implied in Guatemala. It will not do to say that the bill of lading in its inception was governed by Belgian law. In its inception it was not a contract, it was a mere receipt. The contract of carriage was contained in the charterparty made between a Frenchman

(1) [1924] 1 K. B. 575, 595.

and a Norwegian in which Belgian law is not a term. Therefore, even if the Guatemalan Government were bound by the bill of lading as at its inception by reason of asking for delivery, the shipowner cannot import Belgian law into it. I know of no authority for saying that a term of some foreign law can be inserted into the contract (by bill of lading) which, if it is to govern the rights of the parties, when first issued contains no such term, or if at some later period it contains no such term either.

How can it be said that the plaintiffs made any contract which is governed by Belgian law ? The only way in which it can be said is to say that the contract was the bill of lading under which the property passed by consignment under the Bills of Lading Act, 1855, and that that bill of lading was governed by Belgian law. The Bills of Lading Act only makes the Guatemalan Government a party to such a contract if they are consignees to whom the property in the goods passed upon or by reason of such consignment. In this case the Guatemalan Government were owners of the goods by virtue of having accepted and paid their sellers for them, and not by virtue of the bill of lading. They did not buy the bill of lading. The bill of lading was only a receipt. It would be strange if a foreign shipowner, who fails to comply with the foreign law supposed to govern his bill of lading, can say the foreign law is an implied term in it and take advantage of it, when he omits any reference to this law from his bill of lading.

The real position is that the Guatemalan Government says: " Give me my goods and I will be bound by the terms of the document I am presenting to you and no more," as was the case in *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co.* (1) The important passages in that case are in the judgments of Bankes and Scrutton L.JJ. Atkin L.J. sums up this point in these words : " It follows that the contract to be inferred in cases such as this is that the holder of the bill of lading and the shipowner make a contract for the delivery and acceptance of the goods on the terms of the

(1) [1924] 1 K. B. 575, 589, 595 et seq., 600.

bill of lading, so far as they are applicable to discharge at the port of discharge."

According to Sir Robert Aske, the plaintiffs took the bill of lading, which was a Belgian bill of lading made out in Belgium, and although at the time it was made out it was only a receipt, nevertheless, as soon as it changed hands it became the operative document in regard to the goods and was governed by Belgian law and was subject, therefore, to the Hague Rules. The answer to this is that at the time it was handed to the shippers it was only a receipt and s. 91 of the Belgian Code has no application to it. The maker of the bill of lading had no intention otherwise; he never said a word about Belgian law and it could not be implied. The person he handed it to was the charterer and the contract with him was in the charterparty. The place where the contract with the plaintiffs was made was Guatemala City. Further, the argument based on the transfer of the bill of lading presupposes that the Belgian law applies. Even if the plaintiffs by taking delivery incurred the same liabilities as the shipper under the bill of lading they only incurred a liability to which s. 91 of the Belgian Code had no application. Whether, therefore, one regards the contract between plaintiffs and defendants as that made at Puerto Barrios, which in my opinion is the right view, or that made in Antwerp, the result is the same. It cannot be that a document which in its inception had nothing to do with and was not subject to Belgian law could afterwards become subject to it.

In my judgment Belgian law had nothing to do with this case. The argument for the defendants was, however, based on it and I must deal with it. First, what is the Belgian law? It is contained in art. 91 of the Code, which was intended to bring into force the Hague Rules. These Rules are the outcome of a Convention by some of the Maritime Powers held in 1923 at Brussels: see Temperley's Carriage of Goods by Sea Act, 1924, 4th ed., p. 93. The English Carriage of Goods by Sea Act, 1924, embodied the Rules in a Schedule to the Act, and by Order in Council of

October 9, 1924, the Rules were applied as from January 1, 1925. It is to be noted that the English Act confines its application to outward bills of lading only. Other foreign countries, including Belgium and France, signed the Convention on August 25, 1924. Guatemala was not a party to the Convention and never signed it. The Scandinavian countries were not parties to the Convention and did not sign it, but by 1932 Norway appeared to be contemplating legislation on these lines: see Temperley, 4th ed., p. 107. No foreign country brought the Rules into force by enactment except Belgium and possibly, to some extent, the Netherlands. The Belgian Code is different to the British Act, notably in that the Code applies to both outward and inward bills of lading. The operative words in the English Act are that the Rules "are to have effect" in relation to carriage under bills of lading to which the Rules apply. Every such bill of lading is to contain an express statement that it is to have effect subject to the Rules.

The operative part of the Belgian Code in art. 91 says: "(A) A negotiable bill of lading . . . . is governed by the following Rules. (B) Any bill of lading (issued under the Rules) shall contain a statement that it is governed by the Rules of Article 91." One of the Rules, s. 1 (*b*), provides that the Rules apply to a bill of lading "issued by virtue of a charterparty from the moment when this document governs the relations between the carrier and the holder of the bill of lading." In the English Rules the word "regulates" is used instead of the word "governs." Monsieur Frank, who gave evidence before me, said that by Belgian law this means from the moment the bill of lading is remitted to a third party who is not a party to the charterparty. He said that the provisions apply by reason of the fact that the bill of lading is remitted, and the Rules apply retroactively from the time of shipment. He further said that if the shipper is the charterer and he sends the bill of lading to an agent, and the agent himself presents as agent, art. 91 does not apply. He said that if the bill of lading is negotiated the third person is bound, for art. 91 applies as soon as the bill of lading gets into the hands of a person who is not a party to the charterparty. I understand this evidence (as to getting into the hands of a third party and remitting the bill of lading and so forth) to mean that when the bill gets into the hands of a third party by negotiation on a transfer of property the Rules come into operation, and that they do not do so when there is a mere handing of the bill to some one to collect the goods for him.

It seems to me that if the argument of counsel for the defendants is to succeed he must satisfy me: (1.) That the bill of lading was a negotiable bill and was negotiated; (2.) That a bill of lading which leaves out any statement that it is governed by the Rules as required by the Code has such a term implied in it. Sir Robert Aske has not succeeded in satisfying me on those points.

The only bill of lading in the agreed statement of facts says in terms it is not negotiable. In this case the shipper took good care never to let the bill of lading out of his hands and control except for the purpose of getting the goods from the port of discharge to their final destination—namely, Guatemala City, which work he had undertaken to do under his contract. It is true that he allowed the representative of the Guatemalan Government to get the goods from the ship, but only for the shippers' purpose of forwarding them to their final destination. There is no evidence that the bill of lading was negotiated or of any payment for it or of any indorsement of it. The goods did not pass to the Guatemalan Government by reason of the consignment.

Further, it seems to me that a bill of lading which by the law of Belgium must contain a statement that it is governed by the Rules, and does not contain such a statement, cannot be held to have the same effect as if it had. What, then, is the position of the parties? The Government of Guatemala are the owners of goods by reason of their contract with the French sellers from the time of acceptance at the sellers' works. They do not come within s. 1 of the Bills of Lading Act: Scrutton on Charterparties and Bills of Lading, 13th ed., p. 476, especially note (*b*), and art. 18, p. 53, and art. 3,

p. 10. The bill of lading is a mere receipt. The bank held the documents all the time for the shipper, and until the goods got to Guatemala City, not later than eight days after arrival at Guatemala City, they were not free to pay over the balance of the money to the shippers. The clause as to payment of the last 33 per cent. at Guatemala City against shipping documents could not apply to a bill of lading which had to be presented to the ship at Puerto Barrios. The Government of Guatemala never bought or paid for the documents. The goods became theirs by acceptance after inspection at the works in France. It was not a c.i.f. contract. The sellers undertook to get the goods transported and to see to the insurance to Guatemala City, the insurance running from the date of acceptance of the goods till eight days after arrival at Guatemala City. The sellers, having undertaken to do the whole transport to Guatemala City, had originally intended their representative to go to Puerto Barrios to receive the goods and rail them to Guatemala City. Later it was arranged that the bank or the Guatemalan Government should do it for them.

It is said that *The Torni* (1) governs this case. If I thought the facts were the same I should hesitate long before differing from it, but the facts in that case are quite different. In that case the indorsees of the bills of lading, which were the only contracts of carriage—there being no charterparty—presented the bills of lading to the ship. They took the bills of lading, as to which the Palestine Ordinance was deemed to apply whether so stated in the bills of lading or not. In their inception they were deemed to have the Ordinance included as a term, and the indorsees who took the bills of lading issued in those circumstances were held by the terms of the Ordinance. The position of the other people in that case, who merely presented the bills of lading, the circumstances as to their position not being clear on the evidence before the Court, was left undetermined. It is true that Langton J. held them equally bound, but that is not this case, and the Court of Appeal held that without further

(1) [1932] P. 27 and 78.

facts it could not be determined. It seems to me that this case which I am deciding illustrates the wisdom of the Court of Appeal in so doing. Moreover, in that case carrier and shipper knew all about the Palestine Ordinance. In dealing with the persons who were not the indorsees of the bills of lading Langton J. says this: "In other words, when once they present the bills of lading and it has been ascertained what was the original contract between the shipowners and the shippers, it is for the shipowners to show that something has occurred to alter that original contract in the hands of the new holder. In the present state of commerce it is not difficult to conceive a case in which the shipowner could show such circumstances. Having arrived at the port of discharge an insolvent consignee or assignee is unable to pay the freight and take delivery of the goods. A new bargain is thereupon entered into by the shipowners with a person who is neither consignee or assignee. The contract in the bill of lading might then become of no importance, though the goods had been shipped and carried under the contract contained therein. But, in the absence of any evidence of circumstances which would or might change the original terms of the bills of lading, I do not think that upon any known principle the shipowner can be heard to say that a contract which meant one thing in its inception meant something else when it had passed into the hands of a fresh holder." (1)

Here, the shipowner either knew of the Belgian law and, as his country had not agreed to the Convention or adopted its provisions, chose to disregard it, or he did not know of the Belgian law and never gave it a thought and had no regard to it. He does not prove which of these positions he occupied, and he cannot now turn round and say it was an implied term of the contract. The nations have not adopted a uniform system of applying the Hague Rules. Most nations have not embodied them in their law at all, others differ in the way they have adopted them. The Belgian Code in adopting the Convention enacts that the Rules should

---

(1) [1932] P. 27, 43.

1933

THE ST. JOSEPH.

Bateson J.

apply to both inward and outward bills of lading, the English Act applies the Rules to outward bills of lading only. The Belgian law says that bills of lading are " governed by " the Rules ; the law in force in Palestine says the Rules are to be deemed to be inserted. It is somewhat alarming to contemplate how many doors to confusion in mercantile business are opened by these attempts to legislate for the whole world.

In my view these Rules cannot be considered to be a part of the contract contained in the bill of lading unless the parties to it have clearly agreed that they shall apply, and if it is desired to make the Rules part of the contract contained in the bill of lading, that intention should be expressed in clear terms. The result is that the plaintiffs' right to recover damages is not limited to the sum of 3500 belgas per package. The plaintiffs, therefore, succeed and are entitled to their costs subject to the usual reference.

Solicitors for the plaintiffs : *Wm. A. Crump & Son.*

Solicitors for the defendants: *Ince, Roscoe, Wilson & Glover.*

E. C. M. T.

1933
Jan. 31 ;
Feb. 7 ;
March 3.

THE NAPIER STAR.

Shipping—Collision—Damages—Interest on Sums allowed for estimated Repairs and Demurrage—R. S. C., Order XXVIII., *r.* 11.

On a reference to assess damages by collision interest is not awarded upon the sums allowed in respect of estimated repairs and estimated demurrage which will be incurred in futuro: i.e. upon items of the claim in respect of which no expenditure or loss has been incurred at the date of the reference.

MOTION in objection to the report of the registrar on a reference to assess damages.

The plaintiffs were the owners of the steamship *Leeds City* ; the defendants were the owners of the steamship *Napier Star*. The reference arose out of a collision which took place on February 3, 1931, in the River Plate between the two vessels ; the defendants admitted liability and the plaintiff's claim was referred to the late registrar, Mr. E. S. Roscoe, for assessment. At the time the reference was held the *Leeds City* had been temporarily repaired, but the permanent repairs had not been executed. The registrar, in addition to the cost of the temporary repairs, allowed in respect of the estimated cost of (*a*) the permanent repairs, (*b*) demurrage, (*c*) consumption of coal and stores during that period, (*d*) survey fees, and (*e*) pilotage, etc. [items 27–31], a total of 1400*l*. The report concluded with these words: " I find there is due to the plaintiffs in respect of their claim, the sum and interest as stated in the schedule hereto annexed together with the cost of proving their claim." At the end of the schedule, in which the amounts allowed totalled 3493*l*. 14*s*. 9*d*., the registrar had added : " with interest at 5 per cent. from February 22, 1931, until paid." February 22 was the date when the plaintiffs paid the temporary repair bill.

The defendants moved to vary the report by adding to the words " with interest . . . . until paid " the words " save items 27 to 31 inclusive," on the ground that these words were omitted from the report through a clerical error or accidental slip ; but subsequently, by leave of the Court, the notice of motion was amended in order to raise the point that the defendants were not in law liable to pay interest on these items.

Lewis Noad K.C. for the plaintiffs.

Brightman for the defendants.

[The arguments are fully stated in the judgment. In addition to the cases there cited reference was also made to *The Dundee* (1); *The Gazelle* (2); *The Hebe* (3); *The Rosalind* (4); *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (5); *The Crispin* (6); and *In re Swire.* (7)]

March 3. LANGTON J. read the following judgment: This motion concerns five items in a report of the late Mr. Registrar Roscoe, dated July 29, 1932. The question at issue is whether or no interest is payable under the report upon the items numbered therein as 27, 28, 29, 30 and 31. It was originally brought before me upon a motion by the defendants to add certain words to the report on the ground that these words had been omitted from the report of the learned registrar through a clerical mistake or accidental slip. As the result of the first hearing, however, Mr. Brightman elected to avail himself of leave from me to reconstitute his motion upon a broader ground.

As it now stands, the motion raises the point whether interest is payable or ought to be ordered to be paid upon items of estimated repairs and estimated demurrage, in circumstances where ex concessis no expenditure of any kind has been incurred at the date of the report.

Two main questions were argued and one subsidiary point. The main questions were: first, what does the report as it stands mean—a question of construction; secondly, how ought the registrar to deal with interest in these circumstances—a question upon the merits. The subsidiary point—a question of practice only—was whether this particular matter could and ought to be dealt with as the defendants had sought to deal with it under Order XXVIII., r. 11.

---

(1) (1827) 2 Hagg. 137.

(2) (1844) 2 W. Rob. 279.

(3) (1847) 2 W. Rob. 530.

(4) (1920) 37 Times L. R. 116.

(5) [1893] A. C. 429, 437.

(6) (1929) 34 Ll. L. R. 400; 35 Ll. L. R. 197.

(7) (1885) 30 Ch. D. 239, 243.

First, upon the question of construction. The report is couched in these terms: "I find that there is due to the plaintiffs in respect of their claim, the sum and interest as stated in the schedule hereto annexed, together with the costs of proving their claim." The schedule is then set out, and at the end of the schedule there are these words: "With interest at 5 per cent. from 22nd February, 1931, until paid."

It is not in dispute that the date of February 22, 1931, was the date upon which the plaintiffs paid the bill for temporary repairs effected immediately after the collision. The collision occurred on February 3, 1931. The claim in the schedule was put forward upon a familiar and well recognized basis wherein all items of expenditure actually incurred were first set out, and estimated items were then added in respect of expenses which would have to be incurred for final repairs and the loss by detention which would be occasioned thereby. There is not, I think, much to be gained from a consideration of the form of words used by the registrar. The actual expressions which I have quoted as immediately preceding and succeeding the schedule are both matters of common form in reports of this character. As Mr. Noad pointed out, the final words do not in terms exclude any of the items set out in the schedule. But does it follow that one must therefore apply the expression to every one of them? To my mind there is significance in the date selected as the date from which interest is to begin to run. Every one who is familiar with this class of legal work knows that it is customary to take the date of the payment of the repair bill as the date to commence the computation of interest, for the very simple and obvious reason that this is the date from which the plaintiff has been out of pocket in respect of the main portion of his expenses. Similarly, where the only expenses which have been actually incurred are of the nature of a temporary repair, the date of the payment of the principal temporary repair bill is selected as the interest date for the same reason.

1933

THE NAPIER STAR.

Langton J.

Now, still confining the matter to one of pure construction, what possible significance has the date February 22, 1931, in connection with estimates of repair and detention which are delayed to an indefinite future ? From this aspect alone, I think the registrar's report is, at least, ambiguous. The defendants seek to clarify it by adding the words " save items 27 to 31 inclusive " ; but although, for reasons which I will give, I am wholly in sympathy with this emendation, I am doubtful whether they could succeed, as a mere matter of construction, in demanding that the report should be read in the sense it would clearly have after such an emendation had been made.

I accordingly welcomed the broadening of the basis of the motion which Mr. Brightman elected to make, to enable what is, after all, a point of frequent recurrence to be considered upon its merits.

Owing to the deeply lamented death of Mr. Roscoe it was not possible to make any inquiry of him as to the practice in this class of case; but Mr. Registrar Darby has come to my assistance, and informs me that a fairly exhaustive study of the registrar's reports over a period of about thirty years shows that in no instance has interest been actually and specifically allowed in the case of repairs to be effected or detention to be incurred in futuro, and in some cases interest on such items has been definitely excluded. The weight of practice, therefore, seems to be definitely against the plaintiffs.

By way of authority Mr. Noad cited the cases of *The Kong Magnus* (1) ; *The Joannis Vatis* (*No.* 2) (2) ; and *The Northumbria.* (3) These cases, he contended, showed that so far as Admiralty law was concerned, in contradistinction to the common law, liability attaches in respect of the full amount of the loss from the moment of the collision. It is for this reason that interest is given in Admiralty cases as part of the damages, in order to effect a true restitutio in integrum. As to the cases cited in support of this wide proposition it is noteworthy that two are concerned with

(1) [1891] P. 223, 235.
(2) [1922] P. 213.
(3) (1869) L. R. 3 A. & E. 6.

1933

THE NAPIER STAR.

Langton J.

limitation of liability for ships totally lost, and the third, *The Joannis Vatis* (*No.* 2) (1), was a case having reference also to a limitation fund which represented a value according to French law. In *The Kong Magnus* (2) the President, Sir Charles Butt, contrasts the common law rule with that prevailing in Admiralty. If he is right in the explanation which he puts forward, somewhat conjecturally, as the basis of the Admiralty rule, it seems to me that there would be something to be said for a contention that the now well established practice of taking the date of payment of the principal repair bill as the date from which to commence the computation of interest is wrong, and that the proper date to take would be the actual date of the collision. I am at a loss to see, however, how this dictum of Sir Charles Butt can assist the plaintiffs in the present case. They make no complaint of the date chosen by the registrar—namely, February 22, but contend that items as to which admittedly the plaintiffs have not suffered any loss of use of money, since no money has yet been or perhaps ever will be expended, should be held to carry interest from the same date and in the same way as items in respect of which they have equally clearly and admittedly been deprived of the use of their funds. In the report of *The Kong Magnus* (3) there is to be found in a note a concise and admirably clear passage from the reasons of the late Mr. Registrar Roscoe in the case. The case was one of total loss, and the report concludes with these words: "The plaintiffs had for a number of years been deprived of the capital sum, and equally also of the profit derivable from it; I therefore saw no reason to depart from the constant and long practice of the Court in this case. The merchants agreed in my view of the matter." I read this as meaning that the registrar and merchants, who are pre-eminently a business tribunal, had on this occasion, as on all other occasions, asked themselves the simple questions whether and for how long the wronged party had actually been deprived of money upon which

(1) [1922] P. 213.

(2) [1891] P. 223, 235.

(3) Ibid. 236.

profit or interest might have been earned, and awarded in the very words of this report, "as part of the damages to represent the amount of profit arising from the use of the capital sum," an amount stated by way of interest.

It is obvious that in any reckoning of this kind, where the ship has been totally lost, the date from which interest must be taken to run is the date of the loss of the vessel. Hence the decision in *The Northumbria* (1) and in many other total loss cases. *The Joannis Vatis* (*No.* 2) (2) rests upon quite special facts, but it assists neither side in the present controversy.

I am, however, quite unable to see how the fact that it has been the practice—and to my mind a quite comprehensible and correct practice—to allow interest from the date of the loss in total loss cases can be any warrant for saying that in a case of partial loss, such as the present case, the tribunal ought to award interest upon money which has not been expended from the date at which certain money by way of temporary repairs has been expended.

To sum up, therefore, neither upon legal precedent nor upon practice, nor so far as I can see upon any known legal or business principles, should any allowance for interest be made upon items in respect of which no money has been expended.

There remains only the subsidiary point, as to whether this matter could have been dealt with, as Mr. Brightman originally contended, under Order XXVIII., r. 11. In view of the fact that I have, upon his invitation, dealt with the subject as a question of principle, this point as to the meaning and scope of the rule becomes almost academic, or at the most a question which may have some bearing upon the costs. I am bound to admit that two cases cited by Mr. Brightman have rather shaken my original view that the so-called "Slip" Order was not intended to cover a dispute of this class. In *Shipwright* v. *Clements* (3) the defendant in an action in which an injunction had been pronounced

(1) L. R. 3 A. & E. 6.

(2) [1922] P. 213.

(3) (1890) 63 L. T. 160.

against him, upon service of notice of motion to commit him for breach of the injunction, served a cross-notice of motion under the "Slip" Order to amend the decree by the insertion of certain words which he alleged were accidentally omitted from the decree of injunction. North J. held that he had power to act in such a case under this Order, and amended the decree as prayed by the defendant. In the second case *E.* v. *E.* (*otherwise T.*) (1), Lord St. Helier, in spite of strong representations that the application was much too late, held that he had power to rectify and in fact rectified an order in which, as he said, a mistake had been made partly by the registrar and partly by himself in omitting to state a date at which certain payments were to begin. In this case he did not purport to act under the Order in question, and indeed no reference to Order XXVIII., r. 11, appears anywhere in the report of the case, but the case is cited in the Practice books as an example of the scope of this Order, and it is difficult to believe that no reference was ever in fact made to this Order. On the whole, therefore, I am inclined to think that I could have acted under this Order, although I have preferred to deal with the matter as a question of principle raised by special leave after the expiry of the time allowed for objection to the registrar's report. Therefore it follows that the motion succeeds, and that the words prayed for by the motion will be inserted in the report. I propose to give the defendants the costs of the motion except the costs of the first hearing.

Leave to appeal.

Solicitors for the plaintiffs: *Thomas Cooper & Co.*
Solicitors for the defendants: *Wm. A. Crump & Son.*

---

(1) [1903] P. 88.

E. C. M. T.

COLCLOUGH *v.* COLCLOUGH AND FISHER.

1933
April 5, 6.

Divorce—Variation of Settlement—Interest of Children—Power of both Spouses to resettle on subsequent Marriage—Preservation of the Power of Resettlement of Innocent Spouse—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 192.

In variation of settlement after divorce the interests of children of the dissolved marriage are a principal concern of the Court, but it is contrary to usual practice that an innocent spouse should suffer a curtailment of powers conferred by the settlement. In a case in which the settlement gave each spouse power to withdraw funds from settlement and resettle them on a second marriage in the lifetime of the other spouse, the Court reduced the power of a guilty wife to resettle but refused to diminish the power of resettlement by an innocent husband, holding that the interest of the child of the dissolved marriage was sufficiently secured by the diminution of the powers of resettlement by the wife.

CROSS-NOTICES OF MOTION to vary the report upon a petition for variation of settlement.

A decree absolute was pronounced on December 5, 1932, at the instance of the petitioning husband, dissolving his marriage with the respondent wife on the ground of her adultery with the co-respondent. By a marriage settlement dated June 11, 1928, the husband brought into settlement a sum of approximately 30,000*l.*, and the respondent was receiving from her fund under the settlement an income of 930*l.* subject to an annual charge of 287*l.* with a prospect of considerable reversionary income. The trusts were to pay the income of the husband's fund to the husband for life and on his death to the wife for life should she survive and to pay the income of the wife's fund to the wife for life and on her death to the husband for life should he survive, and finally upon the usual trusts for children or remoter issue. Both spouses had power to withdraw a portion of their settled funds on a second marriage—namely, two-thirds should there be one child of the marriage to attain a vested interest and one-half should there be two or more children, and to resettle that portion of their funds upon a subsequent spouse for life and then upon the issue of the subsequent marriage, but so that no child of a subsequent marriage should take a larger interest than a child of the first marriage. The settlement did not limit the powers of a resettlement to the case of a subsequent marriage taking place after the death of one of the existing spouses.

There was one child of the marriage, a girl.

The husband was aged twenty-eight and the wife twenty-two.

The material submissions of the registrar upon the petition for variation were that, having regard to the ages of the spouses and the interest of the child, whose benefit under the settlement would be accelerated by an extinction of the wife's interest in the husband's fund and a limitation of the wife's power to resettle to one-third or one-half of her funds instead of two-thirds, variation should take place as follows :—

(1.) All rights and interest of the wife in the husband's fund should be extinguished as if she were dead.

(2.) The husband's power to resettle should be limited to one-half of his fund.

(3.) The wife's power to resettle should be limited to one-third of her fund.

The husband by his notice of motion objected to the limitation of his power to resettle. The wife asked that her power of resettlement should not be limited to less than one-half of her fund.

It was contended on behalf of the child that the wife's power of resettlement should not be exercisable during the life of the husband, and that the power of both spouses to resettle should be limited to one-third.

Fergus D. Morton K.C. (*R. Bush James* with him) for the husband. There is no record of any contested case in which the power of an innocent petitioner to appoint on a second marriage has been restricted : Rayden on Divorce, 3rd ed., p. 406. The prevailing course has been to extend the power of the innocent petitioner. In *Whitton* v. *Whitton* (1) the petitioner's power was accelerated so as to operate on a second marriage during the lifetime of the respondent. In *Hodgson Roberts* v. *Hodgson Roberts* (1) the original power of the petitioner to resettle two-thirds of his fund if he survived was accelerated as to one-third during the lifetime of the respondent. In Prideaux, 22nd ed., vol. iii., p. 140, an immediate power is given as a precedent. In Key and Elphinstone, 13th ed., vol. ii., p. 563, a postponed power is given; this was no doubt the original form of power given by the settlement in *Hodgson Roberts* v. *Hodgson Roberts.* (1) By adopting the recommendation of the report and cutting down the husband's power the Court will be breaking the original contract of the parties.

---

(1) [1901] P. 348.

H. W. Barnard for the wife. The existing power of the wife over her fund should be retained and made exercisable during the present husband's lifetime. She should be allowed to resettle one-half of her fund. Though guilty she is asking for no favour. By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, the Court has a discretion to regard her interest as that of a party to the marriage. This principle was acted on in *Alston* v. *Alston* (2), although in that case the point was not seriously contested.

R. H. Bayford for the child of the marriage. The principle to be followed is that although the married life has been broken up the child should, as nearly as circumstances permit, be placed in the same position as if it had not been broken up: *Hartopp* v. *Hartopp.* (3) If the marriage had not been dissolved, the child, if the only one, could not have lost more than two-thirds of one parent's fund, even if the surviving parent had remarried. The position on the report is that the child will certainly lose one-third of the wife's fund if the wife is allowed to resettle now and in all likelihood one-half of the husband's fund also. Either the wife's power to resettle should be cut down further, or the child should be compensated out of the husband's fund.

[Langton J. Is there any precedent for penalizing the innocent husband, as proposed in the report ?]

[*Bayford* referred to *Alston* v. *Alston.* (2)]

(1) [1906] P. 142. (2) [1929] P. 311. (3) [1899] P. 65, 73.

As to the argument that the Court cannot interfere with the original contract of the parties : if the settlement suggests a contract which is to have effect after future separation or dissolution of the marriage, that was an illegal contract, being against public policy : *Marlborough* (*Duchess of*) v. *Marlborough* (*Duke of*). (1) The parties cannot bargain about future dissolution of the marriage. That is not an event which they are entitled to anticipate.

R. T. Monier-Williams for the trustees.

LANGTON J. [after stating the facts :] The first point of this motion is that the registrar recommends in head 2 of his submissions that the power given to the petitioner to withdraw a portion of his fund and settle such portion upon a subsequent marriage be limited to one-half of his fund. Under the marriage settlement the limitation was two-thirds, and all that counsel for the petitioner is asking to-day is that his client's power should not be in any way restricted—in a word, that he should be left as he was under the marriage settlement. No one denies that under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, the Court has ample power to deal with these matters in any way that seems to the Court good and right for the benefit of the parties, but from time to time the judges of this Division have laid down what they think to be the wise and proper principles on which to proceed, and for my part I see no kind of reason why I should wish to depart from those principles in these cases. One expression with which I am in entire agreement is the expression which fell from the learned President Lord St. Helier, Sir Francis Jeune as he then was, in *Whitton* v. *Whitton* (2) in which he said this : " But one has in these cases to consider what is really for the benefit of the children, because I think the authorities shew that nothing must be done that on the whole would be for the disadvantage of the children. This does not so much turn on the words of the Act of Parliament, but generally on the principle that the children, being innocent parties,

(1) [1901] 1 Ch. 165, 171.

(2) [1901] P. 348, 353.

ought not to have their interests injuriously affected by the conduct of either of their parents." Nobody I should think would wish to dissent from that. Later Lord Gorell (then Sir Gorell Barnes) in a case of *Hodgson Roberts* v. *Hodgson Roberts* (1) made this observation: "Where a younger life or lives is or are obliterated from consideration, and the settled funds are cleared of that life or lives, it is not unreasonable that some benefit should be conferred on the innocent parent, which would not be a substantial detriment to the child, and is the more reasonable from the fact of the petitioner being comparatively a young man." In this case the petitioner is twenty-eight years of age and the respondent is twenty-two, and it might not, therefore, appear surprising if the petitioner had come to ask that his powers, instead of being curtailed, should be extended. He has not asked anything of the kind. He has merely asked to be left as he was, and no case has been adduced to me save one, *Alston* v. *Alston* (2), which I will notice in a moment, in which an innocent petitioner, or I will say the innocent party in the case, has suffered a curtailment of powers. The counsel for the wife in this case was engaged in *Alston's* case (2), and has candidly admitted that the point was not seriously argued in Court and may, therefore—I think his recollection did not carry him further than that—have been the subject of compromise. Another case, in which Hill J. stated the principle, or made a general statement of guidance in these matters, is the case of *Prinsep* v. *Prinsep*. (3) He says this: "The main object of variation is to make proper provision for the injured spouse and the children of the marriage. And prima facie, settlements ought not to be interfered with further than is necessary for that purpose. But the Court which has annulled the marriage must not only protect the injured party, but also be fair to the wrong-doing party." I have stated these passages, because they seem to me to be passages that it is useful to bear in mind in dealing with matters of this nature. It must not be supposed that because I have arrived at a slightly different view to the view put forward by the registrar I am suggesting that he has acted contrary to principle, but I am impressed in this case with the fact that the original settlement reserved a certain power to the innocent petitioner and, in spite of the able argument on behalf of the child, I cannot see that it is necessary in order to secure the well-being of the child that the petitioner's powers should in any way be interfered with. It seems to me that the child's position is sufficiently secured having regard to the ages of the parties, to her position in life, and to the bulk of the fund that exists. They are, all of them, of course, quite material matters, and it seems to me that her position with regard to all those matters is sufficiently secured without any variation of the husband's powers under the settlement.

---

(1) [1906] P. 142, 144.
(2) [1929] P. 311.
(3) [1929] P. 225, 236.

I will deal now with the wife's side of the matter. The registrar has in head 3 of his submission reduced the wife's powers to resettle from two-thirds, as originally fixed, to one-third. Having regard to the benefit which the child obtains under the variation from the more immediate opportunities of profit, I think that the submission standing by itself is right and sufficient and quite enough to secure the interests of the child, which rightly have been stated to be the principal concern of the Court. It was argued on behalf of the wife that that was treating the wife too hardly. I have borne in mind the statement of Hill J. in *Prinsep* v. *Prinsep* (1) that the Court has a duty to be fair to the wrongdoing party, but having regard to the amounts in this case and the situation of the respective parties, I do not think the wife has been too hardly treated by the suggested variation. I think that is the proper variation under the circumstances.

There remains, therefore, only to be noted the argument put forward on behalf of the child on another point. Counsel for the petitioner re-enforced his argument by saying: "In varying this marriage settlement as against me, as is suggested by this report should be done, you are breaking the contract

(1) [1929] P. 225, 236.

1933

COLCLOUGH
v.
COLCLOUGH
AND
FISHER.

Langton J.

which the parties themselves entered into." To that it was replied for the child: "You are doing nothing of the kind, because if there was in this marriage settlement any suggestion of a contract which should have effect after the marriage had been dissolved, then it was an illegal contract, being against public policy, and that provision could have no effect." I must say that the argument startled me as much as it interested me, but I have come to the conclusion that it is not really a sound point. It is based upon one case (1) in which the affairs of the then Duke and Duchess of Marlborough were considered in 1901, but I do not think that the reading sought to be given to that case is really correct. I think that the case really only dealt with the question of contemplation of separation, and it may well be—and I want nothing I say to suggest that it is not so—that in a case where the parties agree in advance that something should happen upon a separation which has not got the sanction of the Court, that may well be against public policy. It is not necessary that I should determine the point here and now, but I can well understand that that may be so. But the contemplation of a remarriage after a present marriage has been dissolved does not seem to me to stand at all upon the same footing, and I am at a loss to see why any agreement made with that matter in contemplation should be against public policy. It is an ingenious point, but I do not think that it is necessary that I should decide it, although I have considered it, as I have arrived quite independently of it at the view which I have already expressed.

In this case the result will be that the report of the learned registrar will be varied as regards head 2 in such a way as to leave the petitioner in the position in which he was under the settlement.

Solicitors for the petitioner: *Withers & Co.*

Solicitors for the respondent: *Gordon, Dadds & Co.*

Solicitors for the child of the parties and the trustees of the settlement: *Trower, Still & Keeling.*

R. M. M.

(1) [1901] 1 Ch. 165.

[IN THE ARCHES COURT OF CANTERBURY.]

ON APPEAL FROM THE CONSISTORY COURT OF ST. ALBANS.

1933
March 21.

In re LITTLE GADDESDEN CHURCHYARD.

Ex parte CUTHBERTSON.

Ecclesiastical Law—Faculty—Erection of White Marble Memoria in Churchyard.

A faculty to erect a memorial in a churchyard was refused by the Consistory Court on the ground that the memorial was to be of white marble. It was 8 feet by 4 feet and consisted of a St. Andrew's cross about 1 inch above the ground. Resting on the cross was a vase about 20 inches above the ground. Forty-one per cent. of the memorials already in the churchyard were of white marble :—

Held, on appeal, that there was nothing illegal in the use of white marble for the memorial and that in the circumstances the wishes of the petitioner ought to be acceded to and a faculty granted.

Appeal from a refusal by the Consistory Court of the Diocese of St. Albans given on January 20, 1933, to issue a faculty for the placing of a white marble monument in Little Gaddesden churchyard in the county of Herts over the grave of the wife and infant son of the petitioner, Geoffrey Bourke Cuthbertson, a parishioner.

The proposed monument, which was to consist of a St. Andrew's cross, measured 8 feet by 4 feet and was about 1 inch above the ground, with a vase resting thereon, 1 foot 8 inches above the ground. The material was white marble. The incumbent, Canon Barkway, refused his permission on June 24, 1931, stating that he was " not entirely a free agent in the matter," in view of a recent report of the Central Council for the Care of Churches. The petitioner then presented a petition to the Consistory Court of St. Albans, which, as stated above, refused a faculty. The ground of refusal by the Chancellor was that the monument was to be of white marble. It appeared that 41 per cent. of the monuments already in this churchyard were of white marble.

Wilfrid Lewis for the appellant. The refusal of the faculty was not justified. There is no reported case in which objection was taken to a monument on account of the material of which it was to consist, and in Cripps' Law relating to Church and Clergy, 7th ed., p. 420, the only grounds of objection enumerated are those relating to "size or shape, or . . . . inscriptions." But no doubt there are cases where this might be a proper ground of refusal—for example, if the material proposed would obviously crumble away in a few months. It cannot be said that white marble is an unsuitable material, for it has been the medium employed in all great sculpture.

[*Keet* v. *Smith* (1) was referred to.]

In exercising his discretion the Chancellor should have regard to and the test must be the character of the churchyard in question. It may be that, in a case where there was no other white marble monument and where the introduction of one would make a glaring splash of white marring the beauty, simplicity and repose of the churchyard, the discretion would be properly exercised by refusing a faculty. But where, as in the present case, 41 per cent. of the memorials are of this material it is not a proper exercise of discretion to refuse a faculty. The incumbent never exercised a real discretion ; he said himself that in refusing permission he was not entirely a free agent, and apparently considered himself bound by the report on the care of churchyards issued by the Central Council. He has mistaken advice for direction. The Chancellor apparently held that white marble monuments in churchyards are forbidden.

No one appeared in support of the Chancellor's judgment.

The Dean of the Arches (Sir Lewis Dibdin, D.C.L.). This is an appeal from the refusal of the Consistory Court of St. Albans to grant a faculty to put a memorial over the grave of his wife and child in Little Gaddesden churchyard on the petition of Mr. G. B. Cuthbertson, a parishioner. The proposed memorial takes the shape of a St. Andrew's cross of the requisite dimensions. The cross is only 1 inch above the ground, and the vase

(1) (1876) 1 P. D. 73.

1933

LITTLE GADDESDEN CHURCHYARD, *In re.* CUTHBERTSON, *Ex parte.*

The Dean of the Arches.

in the middle is very plain and would only be 20 inches above the earth. I think that in the consideration of this case there has been some misunderstanding. In the first place the incumbent's so-called discretion does not exist. All that he can do, when any one wishes to erect a memorial, if he does not consent, is to say that that person must obtain a faculty, and if that faculty is refused the matter cannot proceed. That is the power of the incumbent—he has no judicial discretion. In the second place there has been a grave misunderstanding as to the report of the Central Council for the Care of Churches, and its pamphlet on the care of churchyards. That report is merely advice, and does not profess to be anything else. The incumbent in the present case thought that he was bound to follow that report. He spoke of himself as a man under authority, referring to the diocesan report, which followed the lines of the report of the Central Council. That is wrong, for, as I have said, these reports are merely advice. The only authority is that of the Chancellor and of the Court to which appeals from his decision can be taken.

In the present case the parties had placed themselves in a difficulty, because at an early stage it appears that a design for the memorial was sent to the Chancellor, and he is alleged —though he denies it—to have given an opinion which is in accordance with his subsequent judgment on this petition.

The question is, Ought this memorial to be allowed? There is nothing objectionable in its shape, nor in the inscription; but it is of white marble, and that is much against modern taste and modern advice. It is true that a considerable portion of the memorials in this churchyard are of white marble, and some of them were authorized by the incumbent himself, although, as he said in one of his letters, he has always disliked white marble in the churchyard. On the other hand, it is fair to say that if in the future there is to be no white marble in the churchyard at Little Gaddesden the incumbent must make a beginning in his refusal to authorize it. But what will strike the ordinary man is,

1933

LITTLE GADDESDEN CHURCHYARD, *In re.* CUTHBERTSON, *Ex parte.*

The Dean of the Arches.

that it is too late in the day now to exclude white marble from this churchyard, in which about 41 per cent. of the memorials are of that material. Possibly, if this was an attempt to introduce white marble into a churchyard where there had been none hitherto, the Court might hesitate at this date to authorize it. The Court of course would have to consider the particular memorial proposed from other points of view also. The present one is quite unobjectionable in the sense that it is not staring, the kerb being only 1 inch above the earth and the vase only 20 inches. It is impossible to leave out of one's mind the extreme transitoriness of taste in these matters. Who can say whether half a century hence white marble may not again be in fashion ? Even so great an authority as Sir Trustram Eve—who is also the vice-chairman of the parochial church council of Little Gaddesden—strongly supported this particular memorial.

On the question of legal authority no reported case has been cited to me, and I have never heard of one in which the material of a proposed memorial was in dispute. The cases generally have to do with the inscriptions, as in *Keet* v. *Smith* (1), the case of the Wesleyan minister, where the judgment of this Court was reversed by the Privy Council. I think that in cases like the present more respect should be shown to the wishes of a petitioner than has been shown here. Of course the law must not be broken ; but there is no legal objection to this memorial. The objection taken is on the ground of taste, the taste of to-day. That is a smaller matter, and in my opinion it ought not to prevail against the wishes of the petitioner. The appeal, therefore, must be allowed, and a faculty must issue.

[The Dean, after saying that he did not see why the registrar of St. Albans should not grant the faculty, on the request of Mr. Lewis retained the case.]

Faculty issued.

Solicitors for petitioner : *Kerly, Sons & Karuth.*

(1) 1 P. D. 73.

W. L. L. B.

1933
May 11, 12,
15, 16.

THE KITE.

Shipping—Damage to Cargo—Tug towing Barges—Collision with Bridge—Prima facie Negligence — Cause of Accident left in doubt — Burden of Proof — Action framed in Tort—Contract for Transport of Cargo —Exception of Negligence—Agency—Sub-Contractors—Negligence of independent Contractor — Limited Authorization for Exemption of Negligence—London Lighterage Clause.

The plaintiff cargo owners contracted with a firm of wharfingers for the collection and transport of the plaintiffs' goods from one wharf on the River Thames to another. The wharfingers, who to the plaintiffs' knowledge owned neither tugs nor lighters, contracted with a firm of lighterers for the transport, and they in turn contracted with the defendants for a tug. The plaintiffs' contract with the wharfingers was on the terms that the latter company should not be liable for any neglect of its servants or others for whom it might be responsible, and that " persons supplying tugs or barges to the company to enable it to fulfil its contracts shall incur no greater liability to the company's customers than that of the company hereunder."

The wharfingers' contract with the lighterers was on the terms of the London Lighterage Clause. It contained an exception in respect of damage arising from negligence, and further stated that the lighterage rates were quoted on the condition that the person with whom the contract was made was either the owner or the authorized agent of the owner of the goods intended to be carried. The lighterers' contract with the tug owners was on the usual towage terms containing a similar exemption from liability for negligence and also an indemnity clause.

The plaintiffs' goods, while on board one of the lighterers' barges, which with others was in tow of the tug, were damaged through the barge colliding with one of the abutments of Cannon Street Railway Bridge. The plaintiffs brought an action against the tug owners, framing it entirely in tort. There being a prima facie case of negligence against the tug, the plaintiffs called no evidence on this point, and the defendants called one witness only, the master in charge of the tug, who did not see the actual contact but heard the blow and saw the barge " flared out," owing, in his opinion, to the breast rope not having been properly made fast by the lighterers' servants :—

Held, that there was no greater probability that the accident happened through negligence on the part of the tug owners' servants than on the part of the lighterers' servants, and that, following Lord Dunedin's dictum in *Ballard* v. *North British Ry. Co.* 1923 S. C. (H. L.) 43, 54, that " if the defenders can show a way in which the accident may have occurred without negligence—. . . . the pursuer is left as he began, namely, that he has to show negligence," the plaintiffs failed on the issue of fact.

Held further, however, assuming that a case of negligence was made out, that there was a limited authorization in each step of the negotiations that the contractor could reserve that the people with whom he in turn contracted should have the like exemptions from liability for negligence as the first contractor obtained, and that the plaintiffs could not rid themselves of the exempting provisions by framing their action in tort.

ACTION OF DAMAGE.

The plaintiffs were "the owners of cargo lately laden on board the dumb barge *Brooklyn*"; the defendants were J. P. Knight, Ld., owners of the steam tug *Kite*.

According to the statement of claim, on February 5, 1932, while the *Brooklyn*, with the plaintiffs' cargo on board, was in tow of the *Kite* bound to Brooks Wharf in the River Thames, "the *Kite* was so negligently navigated by the defendants or their servants that she towed the *Brooklyn* into collision with the abutment of the northern arch of Cannon Street Railway Bridge. In consequence of the collision the *Brooklyn* sustained damage and water entered the barge whereby the plaintiffs' cargo became damaged." The plaintiffs alleged that a good look out was not kept on board the *Kite*, and that she improperly failed to keep the *Brooklyn* clear of the abutment.

The defendants denied negligence, and alleged alternatively that the plaintiffs agreed with Brooks Wharf and Bull Wharf, Ld. (hereinafter referred to as "the Bull Wharf Co."), that the Bull Wharf Co. should arrange for the collection of the cargo and for its conveyance from Harrison's Wharf to Brooks Wharf. It was an express term of the agreement that the Bull Wharf Co. should not be liable for loss, detention, damage or injury of or to the goods or property howsoever and whensoever caused and of what kind soever, and in particular and without prejudice to the foregoing should not be liable, inter alia, for any act, neglect or default of the Bull Wharf Co. or its servants or others for whom that company might be responsible. It was further an express term of the agreement that persons supplying tugs or barges to the Bull Wharf Co. to enable it to fulfil contracts should incur no greater liability to the company's customers than that of the company under the agreement. At the date of the agreement the plaintiffs knew that the

Bull Wharf Co. would contract with an owner of tugs and/or barges for the conveyance of the cargo, and that it would be an express term of such contract that the owner of the tug and/or barges should incur no greater liability than the liability of the Bull Wharf Co. (1)

In pursuance of the agreement the defendants alleged that the Bull Wharf Co. agreed with a firm of lighterers, Wrightson & Son, Ld., that the latter firm should supply a barge for the collection and conveyance of the cargo, and that it was an express or implied term of this agreement that Wrightsons should be entitled to employ any lighter, tug or other vessel belonging to other owners for the purposes of collection and/or conveyance of the cargo. (1) In pursuance of the agreement made between the Bull Wharf Co. and Wrightsons, the latter firm supplied the dumb barge *Brooklyn* and agreed with the defendants that the defendants should tow the barge from Harrison's Wharf to Brooks Wharf. (1)

The defendants pleaded in the further alternative that the Bull Wharf Co. at all material times acted as agents for the plaintiffs for the collection and conveyance of the cargo; that the company acting for and on behalf of the plaintiffs agreed with Wrightsons, and that in pursuance thereof Wrightsons agreed with the defendants for the towage of the barge; that the Bull Wharf Co. well knew that Wrightsons would agree with the owner of a tug for the conveyance of the cargo; and that the agreement would be upon the terms that the defendants should not be liable to the plaintiffs for any loss of or damage to any goods entrusted to Wrightsons for lighterage, whether or not such loss or damage was occasioned by the negligence of the defendants, their servants or agents.

It being admitted that the barge was brought into contact with the bridge and that in consequence the cargo was damaged, at the hearing Langton J., after hearing argument, ruled that there was a prima facie case of negligence for which the defendants had to answer. The defendants accordingly called the master who was in charge of the tug. His evidence is fully set out in the judgment. Shortly stated it was to the effect that everything was in order for going through the arch, that he heard a knock, looked round, and saw that two of the barges, of which the *Brooklyn* was one, had "flared" out, and his explanation was that the breast rope could not have been properly made fast by the lighterers' servants. The plaintiffs, on the question of negligence, called no evidence.

---

(1) The terms of the several agreements are more fully set out in the judgment.

Le Quesne K.C. and *Naisby* for the plaintiffs. The claim is based entirely in tort. The defendants had the control of the plaintiffs' goods and damaged them. Prima facie the defendants were negligent, and they have not rebutted that prima facie case. The master in charge of the tug did not see the collision with the bridge, and the lighterman on the barge was not called.

The defendants are not entitled to rely on the exception of negligence in the Bull Wharf clause; they did not supply the tug to the Bull Wharf Co. but to Wrightsons, and Wrightsons were not acting as the Bull Wharf Co.'s agents in hiring the tug—they were independent contractors. This is a very different case from *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.* (1), and the principles applicable in that case do not apply, for the Bull Wharf agreement, by its express words, limits the application of the exemptions from liability to "persons supplying tugs or barges to the company" to enable it to fulfil its contracts, and such persons—and, it is submitted, such persons only—"shall incur no greater liability to the company's customers than that of the company." The tug was supplied to Wrightsons on the basis of the defendants' own towage clause, and to that contract the plaintiffs were not parties. The towing clause itself shows that the defendants did not look to other parties' contracts for protection, for it contains express provision for indemnity. The defendants did not make two separate contracts, one with Wrightsons and another with the plaintiffs. The pleaded case, as amended, that it was an implied term of the agreement with Wrightsons—presumably collected from the London Lighterage Clause (1)—that the defendants should not be liable to the plaintiffs for any damage to any goods entrusted to them by Wrightsons, does not carry the defendants any further; in order to succeed they must prove a contract with the plaintiffs. Assuming, however, that the Bull Wharf agreement applies, on a strict reading of it, it affords no protection from legal liability but only in certain circumstances to a monetary limitation imposed by the Merchant Shipping Acts and the London Lighterage Clause. (1) The defendants' proposition must be that the Bull Wharf Co., as agents of the plaintiffs, entered into a contract between the plaintiffs and the defendants, but Wrightsons, with whom the Bull Wharf Co. contracted, could not have sued the plaintiffs for the lighterage charges, for the plaintiffs had paid the Bull Wharf Co. a consolidated rate.

---

(1) [1924] A. C. 522.

[Reference was also made to *Mersey Shipping and Transport Co.* v. *Rea, Ld.* (2), and, by the Court, to *The Winkfield.* (3)]

Trapnell K.C. and *Wilfrid Lewis* for the defendants. On the question of negligence, if the only inference to be drawn from the defendants' evidence is that their servants were negligent, the plaintiffs of course would succeed; but, where there is a prima facie case of negligence against a defendant, to discharge the onus upon him he has merely to show that there is an equal possibility that some one else was negligent. The only inference in the present case is not that the tug was negligent; indeed the inference is that the negligence was in the servants of the lightermen, although it is not necessary for the defendants to establish this. The burden of proving negligence is really always on the plaintiffs: see the observations of Hill J. in *The Waalstroom* (4), approved by the Court of Appeal in *The Paludina.* (5) In *Ballard* v.

---

(1) This clause does not appear to be set out in any of the text-books and is therefore printed in extenso at the end of the judgment.

(2) (1925) 21 Ll. L. Rep. 375.

(3) [1902] P. 42.

(4) (1923) 17 Ll. L. Rep. 53.

(5) [1925] P. 40, 43.

North British Ry. Co. (1), where there was a prima facie case of negligence, Lord Dunedin said: "if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence." These observations were applied by Scrutton L.J. in *Langham* v. *Governors of Wellingborough School and Fryer* (2); see also Lord Halsbury's judgment in *Wakelin* v. *L. & S. W. Ry. Co.* (3), and the observations of the Irish Court of Appeal (in particular those of Fitzgibbon L.J.) in *Powell* v. *M'Glynn & Bradlaw.* (4)

Assuming, however, that the defendants have failed to discharge the onus upon them, liability can only arise from contract. "It would be absurd that the owner of the goods could get rid of the protective clauses . . . . by suing the owner of the ship in tort": per Lord Finlay in the *Elder Dempster* case. (5) There was no bailment of the goods and the tug owners had not the liability of a common carrier.

In *Barratt* v. *Gt. Northern Ry. Co.* (6) the plaintiffs tried unsuccessfully to raise a case of pure tort where goods were damaged on a railway line other than that with which the owner had contracted: see also *Hall* v. *N. E. Ry. Co.* (7), a similar case; both these cases show that a contract with one railway company enures for the benefit of another company over whose line the passenger or goods have to be conveyed. Similarly with shipping contracts: the *Elder Dempster* case (8) is authority for the proposition that the shipowner can claim the protection of clauses in a bill of lading made between the charterer and the goods owner. It would be impossible to carry on business if a separate contract had to be made by the transporter with every owner of a parcel of goods carried in a barge.

The defendants do not allege a complete chain of agency, although the Bull Wharf Co. were, it is submitted, the plaintiffs' agents to contract with Wrightsons. Their case is

(1) 1923 S. C. (H. L.) 43, 54.
(2) (1932) 101 L. J. (K. B.) 513.
(3) (1886) 12 App. Cas. 41, 45.
(4) [1902] 2 Ir. R. 154.
(5) [1924] A. C. 522, 548.
(6) (1904) 20 Times L. R. 175.
(7) (1875) L. R. 10 Q. B. 437.
(8) [1924] A. C. 522.

that the Bull Wharf Co., having contracted to arrange for the transport as agents for the plaintiffs, contracted with Wrightsons, and that Wrightsons made an agreement well known to all the parties for the towage of the barge by the defendants' tug. The plaintiffs are affected with knowledge and are bound by Wrightsons' contract with the defendants, i.e., the towing clause, or alternatively, by the London Lighterage Clause. That clause is universal on the river; every one handling goods knows of it, and the parties must be taken to have impliedly contracted in accordance with its provisions: see *Armour & Co.* v. *Charles Tarbard, Ld.* (1), and *Lynch Bros., Ld.*, v. *Edwards & Fase.* (2) As regards the Bull Wharf agreement, the contract as a whole was for the transportation of the goods by river, and the plaintiffs were well aware that the Bull Wharf Co. had neither lighters nor tugs. The words "supply to the company" are mere surplusage; the fair reading of the clause is that tugs which will have to be employed to fulfil the contract of carriage shall have no greater liability than that of the Bull Wharf Co. itself. The towage terms on which the tug was employed exempt the defendants from liability to no greater extent than the Bull Wharf agreement, and, as in the railway cases, the defendants can avail themselves of conditions imposed by the Bull Wharf contract even if they cannot rely on their own towage conditions. Were it otherwise, and the plaintiffs recovered against the defendants, the result would be that the defendants would recover the damages from Wrightsons under the indemnity clause, and Wrightsons in turn would claim against the Bull Wharf Co., who would then have a ground of action against the plaintiffs, for it was a term of the plaintiffs' contract with the Bull Wharf Co. that the latter should incur no liability.

Le Quesne K.C. in reply. No other speech in *Ballard* v. *North British Ry. Co.* (3) corroborates the dictum of Lord Dunedin (which was in a dissenting judgment), and his dictum goes further, it is submitted, than has hitherto been regarded as the law, which is that in a prima facie case of negligence the onus is on the defendant until he satisfies the Court with a reasonable explanation of the accident which is incompatible with his negligence. Even if the dictum be a correct statement of the law, however, the defendants have not given a reasonable explanation compatible with absence of negligence; they have left the matter completely in doubt, and that is not sufficient to discharge the onus. Assuming negligence, the defendants in order to succeed must prove agency in order to establish a contract with the plaintiffs, and this they do not now allege. In both *Armour* v. *Tarbard* (1) and *Lynch Bros.* v. *Edwards & Fase* (2) it was clear that a contract had been made between the plaintiffs and the defendants, and the only question was whether the contract included the London Lighterage Clause.

---

(1) (1920) 37 Times L. R. 208.
(2) (1921) 37 Times L. R. 432.
(3) 1923 S. C. (H. L.) 43, 54.

Cur. adv. vult.

May 16. LANGTON J. This case is of no little interest, and at one time it seemed to me to be possibly a case of some importance. Had I arrived at a conclusion which I was at one time minded to do upon the facts, it would I think have given rise to a novel point of law which, in the circumstances, as I now find them, does not really arise. However, as the matter has been argued so fully before me, and as I must consider the possibility that I may be wrong in the conclusion at which I have now arrived on the facts, I think it is wise and fair to the parties that I should express my view on all the matters which have been raised.

The relevant facts are as follows. The plaintiffs are the owners of certain goods perishable when in contact with water—namely, tea, cocoa and rubber. These goods on February 5, 1932, were on board the barge *Brooklyn*, which was in tow of the tug *Kite*. The *Kite* towed the *Brooklyn* up between bridges, and the *Brooklyn* came into collision with the northern abutment of the northernmost arch of the

(1) 37 Times L. R. 208.

(2) 37 Times L. R. 432.

Cannon Street Railway Bridge. In consequence of this collision the goods were damaged.

The plaintiffs are suing J. P. Knight, Ld., the owners of the *Kite*, and, as will be seen from the pleadings, they put their case in the least possible number of words and lay it entirely in tort. Those I think are all the actual relevant facts concerned with a short and concise claim. But in order that the case may be fully understood, and for the purpose of the argument that has taken place here, it is necessary to examine with quite unusual care the whole series of events by which the business of the carriage of these goods in the *Brooklyn* came to be effected.

The plaintiffs are a company—the Rajawella Produce Company, Ld.—and they have been accustomed to carry on business in the City of London for very many years. Indeed I may shorten this matter by saying that all the dramatis personae in this occurrence have done business with each other for periods varying between twenty years as a minimum and fifty years as a possible maximum. Accordingly, each knows the other very well, and each is perfectly familiar with both the manner and, indeed, the details of it, in which the other does business.

The first document of importance is the one which sets out how, and under what conditions, the plaintiffs entrusted their goods to a firm of wharfingers, the Bull Wharf Co. There was no written contract, but it is not denied on behalf of the plaintiffs that the Bull Wharf Co. have been accustomed to do their business for a long term of years under the conditions of a certain clause. The clause, so far as it is relevant, is as follows. For the purpose of easy distinction I will call the various paragraphs in the clause by numbers which do not appear in the clause. Para. 1 is in general terms and it is not necessary to recite it. Para. 2—a somewhat strange paragraph—is in these terms: "The Merchant Shipping Acts 1894 to 1921, and the London Lighterage Clause respectively limit the liability of a lighterman for loss or damage to goods carried by lighter, barge or like vessel, and the Company in respect of such goods shall in no case be liable to a greater extent than may be in fact recoverable from the owner of such vessel." Para. 3 says: "Save in any such case as aforesaid the Company shall not be liable for loss, detention, damage or injury of or to the goods or property, howsoever and whensoever caused and of what kind soever. In particular and without prejudice to the foregoing, the Company shall not be liable for consequences of lockouts, strikes and labour difficulties or for any act, neglect or default of the Company or its servants or others for whom it might be responsible, or for unfitness or unseaworthiness of any barge or tug on loading or commencement of the voyage or otherwise, or for unfitness or breakdown of machinery, appliance, store or refrigeration, or for deviation of craft." Then para. 4: "Persons supplying tugs or barges to the Company to enable it to fulfil its contracts shall incur no greater liability to the Company's customers than that of the Company hereunder." That paragraph has been the subject of much debate, and I shall have to return to it. But it is material to observe in passing that it does convey to anybody dealing with the Bull Wharf Co. that the company may call in the aid of tugs or barges which are not their own property in order to fulfil their contracts.

The next stage of the business was that the Bull Wharf Co. made a contract with Wrightsons, well known lighterers on the river, for the transport of these goods, in a barge belonging to Wrightsons. Wrightsons have been accustomed to work—again to the knowledge of all parties in this case—under the London Lighterage Clause. That clause is so well known that it is unnecessary for me to recite it here, but there are two portions of it which I think are of special importance and I think it may be desirable to read them at this stage. Speaking of the rates charged the clause says this: "They"—meaning the rates—"are quoted upon the express condition that the person with whom any contract is made is either the owner or authorised agent of the owner of the goods intended to be carried, and accepts both for himself and for all other parties interested in such goods the terms and conditions herein contained." Wrightsons,

1933

THE KITE.

Langton J.

therefore, are saying to any one who does business with them: "We do not do business with anybody who comes to us on a matter of transport, save on these terms, that you are actually the owner of the goods, or that you have at least this limited authority from the owner of the goods that you are to be entitled to accept, and do for the owner hereby accept, all the terms and conditions contained in the London Lighterage Clause." At the end of the clause the matter is carried a stage further. The lighterers say to the party with whom they contract or sub-let as follows: "We are to be at liberty to employ any lighter tug or vessel belonging to other owners or to sublet the whole or any portion of the contract, and in either event the above terms and conditions shall apply to such employment or subletting and shall be deemed to have been agreed to between the goods owner or customer and such other owners or sub-contractors." But even when they act in that way, and thereby employ not an agent for themselves but actually a sub-contractor, they say: "We take it that you, who are making a bargain with us for the transport of goods, are willing to be bound so far as the sub-contractor is concerned in the same way as you are bound to us." And the important stipulation, so far as this case is concerned, is that just as in the Bull Wharf clause that I have read there is a perfectly clear exception as regards negligence (I am not forgetting Mr. Le Quesne's point that it is not clear—to my mind it is clear in the exception of negligence—) there is also in the London Lighterage Clause a perfectly clear exception of any damage arising from negligence. I draw attention to the fact that in the London Lighterage Clause they go further than I remember to have seen any contracting party go, by saying that they pass on that exception of negligence and purport to contract for their sub-contractors that they (the sub-contractors) shall also have the benefit of this freedom from the results of damage by negligence.

Now Wrightsons did not, themselves, supply a tug. Indeed—again to the knowledge of all parties concerned—they did not possess any tugs, and they have been accustomed over a long period of years to employ the defendants, J. P. Knight, who supplied the tug *Kite*. They also have been accustomed for a long period of years to do their business upon a well known clause. I need not read it—it is quite an ordinary clause. It presents no unusual features, but it presents a feature of importance in this case in that there is a clear exemption from any liability arising through loss or damage caused by the negligence or misconduct of their servants. That, I think, is the whole business arrangement under which these goods were transported.

With all these careful provisions of each party in the chain exempting themselves and in one case others from any possible loss from negligence, the plaintiffs come forward and say: "Well, nevertheless, you, Messrs. Knight, are liable. We know nothing about your clause, or, if we did know about it, it does not affect us; we did not contract with you at all. The situation as between ourselves is that you had control" —I do not think they say the custody—but "had control of our goods, and while the goods were in your control the goods were damaged."

I now come back to the initial question in the case, which is, Was there negligence, and were the goods damaged by negligence? Mr. Le Quesne on behalf of the plaintiffs put in a letter of admission written by the solicitors for the defendants. It is a letter of January 20, 1933, in which the solicitors say: "So as to save expense at the trial of this action we are quite prepared to admit, on behalf of our clients, that the *Brooklyn* was brought into collision with the bridge and that in consequence the plaintiffs' cargo became damaged." Speaking for myself I do not see how the solicitors could prudently have acted otherwise. That strictly limited admission seems to me to be the only businesslike thing to do in order to save a possible large area of expense. There was also an interrogatory which was answered by the plaintiffs. The question put was whether the plaintiffs did not agree with the Bull Wharf Co. that the latter should arrange for the collection of the cargo at Harrison's Wharf and for its conveyance from

Harrison's Wharf to Brooks Wharf? The answer to that interrogatory was that the plaintiffs agreed with the Bull Wharf Co. that the latter "should collect by themselves or their servants or agents the cargo the subject matter of the claim herein."

On the letter of admission Mr. Le Quesne claimed that there was a prima facie case of negligence against the defendants; that, on the facts, to use a familiar phrase, it was a case of res ipsa loquitur, and that it was for the defendants to rebut that prima facie case. It is fair to say that Mr. Trapnell did not at all agree as to that and argued that there was no prima facie case of negligence; that the defendants had not got the goods in their custody, but only had the control of them temporarily, and that the barge in which they were damaged was not the defendants' barge, and was not actually in charge of one of the defendants' servants. I ruled, however, that there was a prima facie case of negligence. I think it is now far too well established to be challenged that in the case of a tug and tow in the Thames—in the absence of extraordinary circumstances which, of course, always might rebut a prima facie case—the tug is in charge of the navigation, and prima facie must answer for any damage done by the barge that is being towed while the tug is supplying the motor power in that way. It was at one time a subject of controversy whether that was so, but it is now thoroughly established that the tug is in sole control of the navigation, and if the navigation comes to grief the tug has to answer for it in the first place. I think, however, it is material to notice that when one uses the somewhat elusive expression "burden of proof," or "onus of proof," it does not follow that the onus of proof is equally heavy in each case. Two or three authorities to which I have been referred have given me great assistance in that matter. To begin with, one can always derive useful assistance by reminding oneself of the dictum of Hill J. in *The Waalstroom*. (1) In that case Hill J. stated—as I think with very great precision—the position as regards onus of

---

(1) 17 Ll. L. Rep. 53.

1933

THE KITE.

Langton J.

proof, and his general statement in the matter was adopted subsequently by the Court of Appeal in *The Paludina.* (1) Both these cases dealt with the ulterior consequences after the first collision. *The Waalstroom* (2) litigation was concerned with a second collision resulting from the original collision. *The Paludina* (1) was the third or fourth collision resulting from the original collision. What Hill J. says is this: "In my view, in the circumstances of this case, the burden of proving that the consequential damage was a consequence of the negligence is upon the plaintiffs. In my view it is always upon the plaintiffs: but the facts may speak for themselves, and in themselves shift the burden upon the defendants, as, for instance, in a case where stranding immediately follows the collision, and so follows that it speaks for itself and is prima facie a consequence of the collision." Not to pursue the matter further—because the facts of the case are widely different—that I think lays down the position here, and it is important that one should not forget it. The burden of proof is upon the plaintiffs to prove negligence. They seek to prove it by the aid of this letter and the known facts of the case, which it would be idle to deny, that the *Brooklyn* was brought into collision with the bridge and that in consequence the cargo was damaged. That puts upon the defendants, in my view, a burden—not perhaps in the circumstances anything like so heavy a burden as if they were themselves in charge of the vessel in which the damaged goods were—because, obviously, their knowledge then would, or should, be much more detailed and particular than in a case where some one else is in charge of the vessel in which the damaged goods are being carried.

Taking the matter a step further, I was referred to Lord Halsbury's well known statement in *Wakelin* v. *L. & S. W. Ry. Co.* (3) He says this: "I am not certain that it will not be found that the question of onus of proof and of what onus of proof the plaintiff undertook, with which the Court of Appeal has dealt so much at large, is not rather a question of subtlety of language than a question of law." It puts one I think a little upon one's guard against imagining that onus of proof is the simple thing that it sometimes sounds. He goes on to say this: "If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without—her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. She may indeed establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails, because 'in pari delicto potior est conditio defendentis.' It is true that the onus of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue, i.e., in this case the negligent act done, has discharged herself of that burden." That is a passage which I think is useful here and must be applied. The onus of proof may shift from time to time as a matter of evidence, but the question ultimately arises: Have the plaintiffs proved that the defendants were negligent? The plaintiffs say: "You were towing the barge; the barge struck the bridge." That I think is sufficient to shift the burden of proof for the moment, and it is for the defendants to give an explanation of how this occurred. When they have given that explanation one has still to see whether negligence has been proved. The explanation may be disbelieved; the explanation may not at all exclude negligence, but the explanation may leave the matter still in some doubt as to exactly how the occurrence did happen, but leave an equal possibility that it happened without negligence as with negligence. It may, on the other hand, be sufficient to exclude any question of negligence at all. Those are all possibilities of what may result from the explanation.

---

(1) [1925] P. 40, 43.

(2) 17 Ll. L. Rep. 53.

(3) 12 App. Cas. 41, 45.

Before I pass from that I will cite one more case which I think is of great assistance in this question: *Ballard* v. *North British Ry. Co.* (1) The important passage is in the dissenting judgment of Lord Dunedin. As Mr. Le Quesne quite rightly pointed out, being a dissenting judgment it cannot be said to have the full authority of the House of Lords, but following upon *Wakelin's* case (2), and coming as it does from Lord Dunedin, no one would suggest—and certainly Mr. Le Quesne did not—that it is not a dictum to which great weight should be attached. Lord Dunedin says: "I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion. For example in *Scott* v. *London and St. Katherine Docks Co.* (3), a case where a bag of flour fell on a man who was passing along a quay in front of a warehouse, it would not have been sufficient to say that the flour bag might have fallen from a passing balloon. I think this view of mine is borne out by the expressions used in the case of *Scott.* (3) Erle C.J., who gave the judgment of the Court (and it is to be noticed that though he and Mellor J. did not agree with the majority on the facts, the whole matter depending on the interpretation of the judge's notes, the judgment was unanimous on the law), expressed himself thus (at p. 601): 'There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' I take notice of the word 'explanation'; it is not in absence of 'proof.'"

---

(1) 1923 S. C. (H. L.) 43, 54.
(2) 12 App. Cas. 41.
(3) (1865) 3 H. & C. 596.

Now, if that be a correct statement of the law—and I humbly think it is—what the defendants have to do here is not to prove that their negligence did not cause this accident. What they have to do is to give a reasonable explanation, which, if it be accepted, is an explanation showing that it happened without their negligence. They need not even go so far as that, because, if they give a reasonable explanation, which is equally consistent with the accident happening without their negligence as with their negligence, they have again shifted the burden of proof back to the plaintiffs to show—as they always have to show from the beginning—that it was the negligence of the defendants that caused the accident.

I will now turn to the evidence, which comes from one side only, namely, from Mr. Mason, who was in charge of the tug at the time. I expressly do not say the tug master, because Mason was an emergency master. There was a strike of tug men and lightermen at the time, and Mason, who had served a long apprenticeship in matters of navigation generally—he had been on board coasting steamers, a mate on pleasure steamers, during the war a channel pilot, and for some time a mate on a tug—was just the kind of man one would expect people would fall back upon in an emergency to do necessary work of this kind. No one suggests that he was not fully qualified to take on the business of towing four barges between the bridges. The *Brooklyn* was in the charge, as far as can be ascertained—for the evidence was a little vague—of somebody whose customary business lay in a less active field. The evidence is that the barges at this time were being manned from people in the office of Wrightsons, the lighterers. It appears to have been a case of "all hands to the pumps." Anybody who had a pair of hands and could possibly do the business acted as a volunteer to do work on barges at this time. I think that is not at all irrelevant because, to put it shortly, Mason's explanation was that this accident happened because the breast rope from the *Brooklyn* to the barge immediately alongside of her was either improperly, or carelessly, or negligently, but at least not properly, made fast. The flotilla consisted of the tug *Kite* and four barges, in two ranks abreast. The *Brooklyn* was in the starboard sternmost rank, and was breasted, or should have been breasted, to the barge on her port side. The *Kite*, after passing through Tower Bridge with her tows, was following two other tugs and tows ahead of her. The leading tug and tow could only be identified as a small yellow funnelled tug which was proceeding very slowly. The next in the procession was an A. P. C. M. tug with six barges in tow proceeding reasonably rapidly, that is to say at the same pace at which the *Kite* with her flotilla was proceeding. There was a flood tide of about three knots, and both the A. P. C. M. tug and the *Kite* were making a not improper speed in the circumstances, as it seems to me, of six knots through the water, or nine knots over the ground. The flotillas passed through London Bridge, and then, at a distance of about a cable and a half above that, they would have to negotiate Cannon Street Railway Bridge. As they approached the bridge, making for what is known as the central working arch, the yellow funnelled tug with her tow was seen to be in some difficulty with craft ahead. The *Kite* was working up a little to the north of the A. P. C. M. tug, and making to negotiate the middle arch. The A. P. C. M. tug, seeing the trouble ahead, altered her course and made for the northern working arch. The *Kite* found that she was constrained to do the same thing. It is a little obscure why she was obliged to follow the A. P. C. M. tug. I think the real reason that Mason meant to convey was that if he had persisted in going for the centre arch he would either have got his craft athwart the tide, if he had eased up, or have collided with the yellow funnelled tug ahead, and he had no real difficulty in avoiding collision—he would in no circumstances have had any difficulty in avoiding collision—with the A. P. C. M. tug. However that may be, he made an alteration. It is material again to notice that he with four barges made a lesser alteration than the A. P. C. M. tug with six barges in tow, so that there would be less reason for his getting a swing and getting his craft out of control. He was about 150 feet behind the A. P. C. M. tug. I am not prepared to say that there was anything negligent in that, and, therefore, I can see no negligence in the way he was negotiating this part of the river or in the manœuvre which he took immediately before the accident occurred. Exactly what occurred at the moment of the accident was at one time a little in doubt. Mr. Lewis—with that forensic skill for which he is well known—put a series of questions, none in themselves I think objectionable, and presented the picture which I think the witness wanted to present, with the barges flared out. That is to say the *Brooklyn* went out to starboard, and her companion in that rank went out to port, and after they had flared out the *Brooklyn* struck the bridge and the damage resulted. That may be a correct picture, but I do not think that that is all the picture, because when Mason was cross-examined about this and the facts were more exactly ascertained, the picture he really gives is this: "I looked round as I was coming for the arch. I found my craft in line for the arch—everything in order, as it should be, to go through the arch. I then heard the knock of the barge against the bridge. I then heard shouting and I looked round and saw that the barges were flared out." That is not quite the picture, as I say, that Mr. Lewis gently led the witness to give in examination in chief. There was nothing necessarily in conflict between the two pictures, for he did see the barges flared out, but he did not see the collision, and the only possible inaccuracy in the earlier version is that it is not true that he saw the barges flared out before he saw the collision. I have to ask myself in these circumstances, have the defendants offered me an explanation equally consistent with the absence of negligence on their part as with negligence? Is there a stronger case—a far higher probability—I think one could not put it on a mere balance of probabilities—but really a substantially higher probability that this accident was caused by some negligence on the part of the tug, or is it equally possible that there was negligence on the part of the barge?

1933

THE KITE.

Langton J.

I have examined with great care the various manœuvres, and I cannot say that I see any positive negligence upon which I can fasten. I do not think there is any negligence in proceeding at nine knots with a clear eye ahead. I do not see any negligence in following a faster tug through the northern arch. I do not see that I can infer from these facts that the train in tow of the *Kite* did get a swing, and that it must be on account of the swing that the barge struck the northern abutment of the northern arch. It seems to me equally consistent at least that this amateur on board the *Brooklyn* did fail to make his breast rope properly fast. No doubt this alteration of the tug's helm—a port helm alteration—followed by a hard-a-starboard helm, might have imposed upon that breast rope a greater strain than it had endured up to that moment in the towage. But unless it was a wholly negligent manœuvre the breast rope ought to have been so made fast or strong enough to meet that strain. Further than that, I am left in complete ignorance. Mr. Le Quesne pointed out, I think fairly, that he could not give me any evidence in the matter. He said he had applied to the solicitors acting for the lightermen to get a statement from the man in charge of the barge, but the solicitors refused him that indulgence. That seems to me to be the plaintiffs' misfortune; it may not be their fault, but they do not come to offer me any counter explanation. I am not even told how the rope was made fast. Mason told me that so far as he understood it was made fast in the ordinary way round a bollard or dolly on each barge. I could infer that for myself; there is no other way that I know in which a breast rope can be made fast. But whether it was made fast in the proper way to meet an ordinary strain no one can tell me, and I am not even told whether this rope just rendered round the bollard or whether it broke. That information might have given me a great deal of assistance, but Mason, who gave his evidence very fairly and gave me no reason to distrust him, could not tell me. He was most frank on the subject when he was tested about it as to hearing the noise first before he actually saw the flare out, and he was a man of quite sufficient intelligence to have appreciated that it would have been much better for him to have seen the flare out before he heard the noise of the collision. He had not seen the rope made fast. It was not any business of his to see how it was made fast, and he could not tell me whether it was broken or rendered, so that I am left in complete ignorance really as to how this accident happened. I have only the evidence of one credible witness from the defendants, and he tells me that his explanation of the matter is that the rope was not properly made fast. In the circumstances, guided as I am by these authorities, I think there is a state of affairs there at least equally consistent with no negligence, and therefore I am driven to find—I do not say that I do it unwillingly, for I think it is a fair and proper finding in the circumstances—that the case of negligence is not proved against the defendants.

There, of course, I might, in the circumstances, stop, but I have had a very careful and excellent argument from both sides on other questions of law, and I think, in fairness to them, and by way of precaution in case I am wrong upon the conclusions at which I have arrived on this first point, that I ought to notice their several contentions and give my view about them.

If I may attempt to summarize Mr. Le Quesne's clear argument, I think that it amounts to this : "None of these exemption clauses have anything to do with the plaintiffs. They, the owners of the goods, are suing in tort only the people who had control of their goods. The contracts are res inter alios acta—they have nothing to do with the plaintiffs, who are not suing on a contract, and there is no relationship other than that of temporary control between the defendants and the plaintiffs." Mr. Le Quesne seeks to establish that in a variety of ways. First he criticizes the Bull Wharf clause in great detail. He says as regards para. 2 that it deals with limitation of liability and purports to leave the limitation of liability position as it is in the statute and in the London Lighterage Clause, and he says, in effect, there are certain limitations of quantum imposed by statute and by this clause; that those limitations stand and the plaintiffs do not seek to alter them. In cases where these limitations do not exist he says that the Bull Wharf clause seeks to obtain no absolute exemption from negligence, and he is assisted in that argument by the way in which these two clauses are framed. The first is to my mind in an odd declaratory form and declares the existence of the Merchant Shipping Act and the London Lighterage Clause, a declaration which seems to me to be rather supererogatory; I should have imagined that they were known to most people who have dealings with this firm. Having declared that, and declared a certain position under it, clause 3 goes on to say: "save in any such case as aforesaid." It certainly is a fair point to put in argument that "save in any such case as aforesaid" means that anything that has been done by the foregoing paragraphs is not to be affected by what comes in the paragraph heralded in by the words "save in any such case as aforesaid," and, until one looks at clause 2 very carefully, that argument certainly has to my mind great force. But when one looks at that paragraph carefully and considers it with para. 3 and reads it, as I think one is entitled to, with the whole of the rest of the clause and with all the circumstances in mind, I think it assumes a somewhat different complexion. Para. 2 says that: "The Merchant Shipping Acts 1894 to 1921 and the London Lighterage Clause respectively limit the liability of a lighterman for loss or damage to goods carried by lighter, barge, or like vessel." It goes on to say: "and the Company in respect of such goods shall in no case be liable to a greater extent than may be in fact recoverable from the owner of such vessel." When one looks at the London Lighterage Clause—which is the important matter from this point of view—one sees that there is in the London Lighterage Clause a limitation as to quantum in respect of pilferage or theft, and it is to that I have no doubt that the paragraph in the Bull Wharf clause refers. What it means—it certainly is a little obscurely worded—is to my mind quite incontrovertible. It means that where there is loss or damage limited to 20*l.* per package and not exceeding 50*l.* per ton recoverable from the lighterman, that amount shall equally be recoverable by the owners of the goods from the Bull Wharf Company, Ld. Why they think it necessary to put that in and to state that they will be so generous as to restore what, under no circumstances, they could honestly keep, I do not know. It seems to me a form of meagre generosity at the best, and possibly it was not put in for that purpose, but it was thought to clarify the position with regard to the London Lighterage Clause. To my mind it does a good deal to obscure it, but that is a question for those who framed the clause and those who work under it to consider in the future. Mr. Le Quesne says that the whole of para. 3 refers to other conditions than carriage. If it were so, para. 3 would really mean nothing at all. It has got a number of provisions, such for example as "unfitness or unseaworthiness of any barge or tug on loading or commencement of the voyage or otherwise . . . . or for deviation of craft"; and I find it impossible to see how any of those words can be given any meaning if they do not apply to the voyage. How you can deviate with a craft when the craft is still at the wharf is beyond my imagination. I am constrained, therefore, to say that although I see the force of Mr. Le Quesne's argument concerning these two paragraphs—though I am not at all certain that para. 2 is in the right position in this clause in order to express clearly the meaning which they want to give it—I do not think I am doing any violence to the general language of the clause in reading it in the sense that para. 3 gives an absolute exemption in respect of negligence during or before the voyage, and para. 2 gives the owner of the goods the same right as regards pilferage from a barge as is reserved to the owner of the goods under the London Lighterage Clause, which gives him the advantage of para. 2 of the Bull Wharf clause, and gives him the same advantage as he would have had if he himself had contracted under the London Lighterage Clause in respect of pilferage. I think that is all that para. 2

is aimed at and that it is a fair and proper construction of this not very elegantly worded document.

I now come to para. 4 of the Bull Wharf clause to which I have already adverted. Mr. Le Quesne says as to that that this clause may contemplate that tugs or barges are supplied to the company and it may properly provide for what is to be done where these tugs and barges are supplied to the company, but that in point of fact the tug and the barge in this case were not supplied to the company. They were supplied to the independent contractors, and his argument is that you must take the words " Persons supplying tugs or barges to the Company to enable it to fulfil its contracts shall incur no greater liability " strictly as they are written, and that you cannot read the words as if they were " Persons supplying tugs or barges to enable the Company to fulfil its contracts." Again, I do not think that that is a negligible point. I think there is force in it, and if one were dealing with people who by any stretch of imagination could be called strangers to the business—people unfamiliar with the business, who would have to inquire (if they thought it their business to inquire) whether the Bull Wharf Co. did their business with their own tugs and barges or with other people's—I think I should be constrained to read it, as Mr. Le Quesne so forcibly says, in its clear and grammatical sense; but when one comes to remember that these people have all done business with one another for twenty or fifty years; that both the Rajawella Company contracting under this clause and the Bull Wharf Co. knew perfectly well that the tug would be supplied by somebody like Knights if not actually by Knights; and that the barge would be supplied by somebody like Wrightson if not actually by Wrightson—in other words, knew perfectly well that the Bull Wharf Co. must go outside their own resources to carry out the contract which they had undertaken—then I think the matter assumes a different colour. I think it is shutting one's eyes to the known facts to construe this clause in an absolutely strict and grammatical way by saying that it is confined to cases in which tugs and barges were supplied by the company and not by an independent contractor. It is contrary to the known facts—known to everybody in the whole chain—and no one would say that anybody really meant that by the words they have actually used. So much for some of Mr. Le Quesne's arguments upon the Bull Wharf clause.

But in case the case goes further, there were other arguments to which I am afraid I have not done justice. In his very candid argument Mr. Le Quesne put a case before me which has made a good deal of history in commercial law: *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.* (1) At one time I hoped that I was going to get a great deal of assistance from that case, but I suffered disappointment as I went through it and found that I could get no assistance from it at all except along a quite general line. It was argued twice in the House of Lords, and in the end the House of Lords decided that provisions in a bill of lading could not be altogether ignored, even though they were made as between goods owner and charterer and not between goods owner and shipowner. That was, as it were, a beginning of the kind of case that we have to-day, because there the vessel had been chartered for the Elder Dempster Line and there were no actual contractual relations between the goods owner and the shipowner. The goods owner contracted with the charterer, who was the only person he knew, and then sued the shipowner in tort. It is, therefore, the same class of case, but not of course so complicated as the case with which I have to deal now. Lord Cave says: "It was stipulated in the bills of lading that 'the shipowners' should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading; and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and owners alike. It may be that the owners were not directly parties to the contract; but they took possession of the goods (as Scrutton L.J. says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals." That is a clear line of agency, and Lord Cave says there are the shipowners and the charterers. The shipowners' servants are still in possession and therefore one can say that the owners took possession as agents for the charterers and are entitled to the same protection as their principals. Lord Finlay, dealing with the case, took a slightly different view of it. He says this: "This contention seems to me to overlook the fact that the act complained of was done in the course of the stowage under the bill of lading, and that the bill of lading provided that the owners are not to be liable for bad stowage. If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort." Again one must remind oneself that that is not this case, but it is clear that Lord Finlay took the view that the justice of the case demanded that a man who had taken pains to contract himself out of a certain liability ought not to be told afterwards, "you may, as a matter of contract succeed but you are still liable in tort if you have not, as it were, shaken hands with and made the personal acquaintance of the actual individual whose goods you are shipping." Mr. Trapnell, on the same lines, urged upon me that it would be impossible to carry on the business of the Port of London if it were necessary that every man who transported goods in a barge should make the personal acquaintance of everybody who had goods in that barge, and make a separate contract with him. I hope I am always duly impressed with the necessity of the law being in consonance with the needs of commerce, and Mr. Le Quesne suggested the solution of this difficulty when he pointed out that business could

---

(1) [1924] A. C. 522, 534, 548.

1933

THE KITE.

Langton J.

perfectly well be carried on with complete immunity to the barge owner by putting in the same clause of indemnity as that which the tug owner has in this case. If the plaintiffs were to succeed it is not the nominal defendants who would suffer—it would be in fact the barge owners, because the tug owners would immediately recover by way of indemnity. So far as interference with the business of the Port of London is concerned, therefore, it would mean that a clause which is already overburdened with words would be further burdened and an indemnity added all along the line.

I think, therefore, the solution of the case, from the legal point of view, is not to be found in the need for carrying on the work of the Port, but one is not therefore obliged to be blind to the manifest absurdity to which Lord Finlay's observations point. Lord Sumner dealt with the matter in the *Elder, Dempster* case (1) in a somewhat different way and from a different angle. He notices the cases of agency which were adopted by Lord Cave in his opinion, but for his part Lord Sumner preferred the view that this bailment of the goods could not be, as he called it, a bald bailment, in view of the fact of the contract that had been actually entered into between the goods owner and the charterer. He says: "It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be, that the vessel being placed in the Elder, Dempster & Co.'s line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognizes the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention."

(1) [1924] A. C. 522, 564.

For that case, therefore, one gets two possible lines—one the line of agency, the other the line of bailment. One also gets from Lord Finlay a valuable pronouncement as to the way in which a judge may fairly approach this class of contention put forward by the plaintiffs to-day. I hoped at one time that the ingenuity of the defendants was going to show me that I could go peacefully forward upon the line of agency, but Mr. Trapnell, having got as far as Wrightsons on the line of agency, was unable to go further and could not say that there was a line of agency throughout in the full sense. That is to say, he could not claim that Wrightsons, in making their contract with Knights, were in the full sense of the word acting as agents. Quite clearly they were not. They were making an independent contract at an independent rate. I am not so sure whether one does not reach the true solution in this case through what I may call a limited authority of agency. I will deal with that later.

As regards bailment, it was of a very light character, for it was admitted that the tug had not got the custody of the goods; she had nothing but the control; and Mr. Trapnell again specifically disclaimed any desire to travel along the road of bailment. He said he did not think in the circumstances that he could claim that there was a bailment. The two roads opened by the *Elder, Dempster* case (1), therefore, appeared to be clearly barred in this case.

Mr. Trapnell, however, put it in this way: "I do claim that so far as Bull Wharf and the lighterers are concerned, the Bull Wharf Co. undoubtedly were acting as agents for the cargo owners in contracting with Wrightsons." Indeed, in view of the fact that Wrightsons will not contract on any other terms it does not seem to me that business could be done under any other terms, because Wrightsons, by the London Lighterage Clause, insist that there shall be an express condition of the contract that it is made either with the owner or with the authorized agent of the owner. Mr. Trapnell, therefore, seemed to me to be on strong

(1) [1924] A. C. 522.

ground thus far. As regards the further step, his original way of putting the matter was that the plaintiffs through their agents, the Bull Wharf Co., were affected with knowledge of Knight's contract, and he said: "I bring in Knight's contract that way. I say Knights have contracted with Wrightsons, and through Bull Wharf the plaintiffs are affected with knowledge of that contract." For my own part I prefer amother line of reasoning which Mr. Trapnell also adopted, and it is this. One gets as far as Wrightsons with the Bull Wharf Co. as authorized agents in the terms of the London Lighterage Clause to contract for the owner of the goods. Wrightsons, under the London Lighterage Clause, reserve a special right to sub-let upon terms of the London Lighterage Clause, and that seems to me to imply that if they happen to vary the clause for other purposes they have at least this limited authorization that they shall not contract on any worse terms for the owner of the goods than the terms of the London Lighterage Clause, and, so far as this case is concerned, it is not suggested that they did so contract. They are entitled to contract, as it seems to me, upon terms that will be as good as the London Lighterage Clause for the sub-contractor and no worse for the owner, and in this case that is all they have done.

It seems to me, therefore, that if one treats this case throughout not as a case in which each party has acted as agent for the other, in the full sense—because quite clearly they have not, they are really in many senses completely independent contractors—but if one bears in mind what they each knew about the other's business, and the language that they used, one can find in it a limited authorization from first to last—that is from the plaintiffs to the defendants—that in each step of the way the independent contractor may reserve—as he does under the Bull Wharf clause—that the people who follow after shall have the same exemption from negligence as he, the first contractor, has got. One gets it in this way: para. 3 of the Bull Wharf clause gives a complete exemption from negligence; para. 4 gives a reservation that people following after who supply tugs and barges shall have no greater liability. The London Lighterage Clause gives complete exemption from liability from negligence and a reservation in regard to subcontractors, and Knight's clause preserves the same exemption from liability for negligence. Of course, if one were dealing with a case in which the final contractors, the defendants, were claiming something more than had been set out or claimed originally in the Bull Wharf agreement, there might be, I can see, a difficulty, but I do not see any difficulty in inferring a limited authority in view of the fact that everybody knew precisely what the other was doing, and that it was probably a great surprise to everybody concerned that this somewhat ingenious point of tort was relied upon to excuse the defendants.

I do not pretend in this review of the case that I have done full justice to all the arguments on both sides, but I have dealt with what I think are the principal points as I see them, and the result of my judgment is that the plaintiffs fail and there will be judgment for the defendants with the usual consequence as to costs.

Solicitors for the plaintiffs: *Waltons & Co.*
Solicitors for the defendants: *J. A. & H. E. Farnfield.*

E. C. M. T.

NOTE.

LONDON LIGHTERAGE CLAUSE.

"The rates charged by us are for conveyance only, and are exclusive of dock dues, demurrage, disbursements, or other charges. They are quoted upon the express condition that the person with whom any contract is made is either the owner or authorised agent of the owner of the goods intended to be carried, and accepts both for himself and for all other parties interested in such goods the terms and conditions herein contained. The goods are carried only at Owners' and/or Customers' risk, excepting loss arising from pilferage and theft of goods on board the barge whilst in course of transit, such loss or damage being limited to 20*l.* per package and not exceeding

50*l*. per ton. Save as aforesaid we will not be liable for any loss of or damage to goods entrusted to us for lighterage or for any loss damage or expense occasioned to the Owners of the goods or to the Customers, howsoever, whensoever, or wheresoever such loss damage or expense be occasioned, and whether or not such loss damage or expense be occasioned by any negligence, wrongful act, or default of our servants or agents, or other persons for whose acts we might otherwise be liable, or be occasioned by any delay or failure in collecting carrying or delivering the goods and although the barge for any reason may have deviated or departed from the intended transit with the goods and although the goods may have been loaded in the barge with other goods. We will not be liable to contribute in general average. We will not be responsible for any consequences arising from strikes, lock-outs, or other labour difficulties. We are to be at liberty to employ any lighter tug or vessel belonging to other owners or to sublet the whole or any portion of the contract, and in either event the above terms and conditions shall apply to such employment or subletting and shall be deemed to have been agreed to between the goods Owner or Customer and such other Owners or Sub-contractors."

1933
June 19.

H. T. BARLOW (DECEASED).

Probate—Practice—Testator domiciled in Ireland—English Assets—Appointment of Bank of Ireland as Executor—Power of English Court to make Grant of Probate to Trust Corporation constituted under the Law of the United Kingdom or of any part thereof—Union with Ireland Act, 1800 (39 *&* 40 *Geo.* 3, *c.* 67)—*Public Trustee Act,* 1906 (6 *Edw.* 7, *c.* 55), *s.* 6(1) —*Public Trustee* (*Custodian Trustee*) *Rules,* 1926, *r.* 30—*Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 161.

By the Public Trustee Act, 1906, and the Public Trustee (Custodian Trustee) Rules, 1926, r. 30, made thereunder, a corporation constituted under the law of the United Kingdom or any part thereof and having a place of business there and empowered by its constitution to undertake trust business within the meaning of the Public Trustee Act and the rules in question is expressly empowered to act as trustee and executor and administrator, and power to grant representation to a trust corporation is conferred by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 161.

By an Act of the Irish Free State passed in 1929, after the separation from Great Britain, the Bank of Ireland was for the first time authorized to act as executor or administrator. The Bank of Ireland has places of business in Northern Ireland, therefore in the United Kingdom.

A testator domiciled in the Irish Free State, by his will dated in 1931, appointed the governor and company of the Bank of Ireland his executor. Amongst the assets was personal estate domiciled in England. As a preliminary to the issue of a grant of probate in England to the English estate the Bank moved for leave to swear by its representative that it fulfilled the definition of a "corporation" in the Acts and Rules:—

1933

H. T. Barlow (Deceased).

Held, that the Bank having been empowered to undertake the business in question only since the establishment of the Irish Free State, had that power within the Free State only and was not for the purpose of the motion a "corporation constituted under the law of the United Kingdom or any part thereof," and that the motion accordingly failed.

Henry Theodore Barlow, of Mountain View, Killiney, in the county of Dublin in the Irish Free State, died on December 30, 1932, leaving a will dated May 12, 1931, of which he appointed the governor and company of the Bank of Ireland executor and trustee. Amongst the assets was personal estate valued at 2407*l.* 10*s.* domiciled in England. The Bank was incorporated by Royal Charter in 1783 pursuant to Acts of the Irish Parliament before the Union of Great Britain and Ireland, and by art. 8 of the Union with Ireland Act, 1800 (39 & 40 Geo. 3, c. 67), it was provided that all laws in force at that date within the respective kingdoms of Great Britain and Ireland should remain. By Act 4, 1929, s. 5, sub-s. 12, of the Irish Free State, the Bank was for the first time authorized to act as executor, administrator or trustee. The question arising, having regard to the existence of personal estate domiciled in England, was whether the Bank fulfilled the definition of "a corporation constituted under the law of the United Kingdom or of any part thereof and having a place of business there and empowered by its constitution to undertake trust business" within the meaning of the Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 4, and the Public Trustee Rules, and as such corporation entitled to take probate in England, pursuant to the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 161. The Bank had places of business in Northern Ireland, and therefore in a part of the United Kingdom. The Bank now moved for leave to swear by its duly authorized representative that the Bank fulfilled the definition given in the Acts and Rules.

The application was originally ex parte, but the Official Solicitor, having been notified of the motion by the direction of the President, now appeared by counsel to assist the Court.

Willis K.C. and *Harold Murphy* for the Bank. The term "constituted" is of wide import and equivalent to "established." It is not limited to the original purpose of a company. Any statute which confers powers upon it is a constituting statute: *In re East and West India Dock Co.* (1) The Bank operates in Northern Ireland and is a Bank of the United Kingdom in spite of the separation of the Free State.

Theodore Turner for the Official Solicitor. The corporation in order to be qualified to take the grant must be constituted with that power, and so constituted by the law of some part of the United Kingdom. There must be an assignable date when the power to take the grant arose. Here that date was clearly too late for the law of any part of the United Kingdom to have conferred the power.

THE PRESIDENT (LORD MERRIVALE). What is in question here is whether the Bank of Ireland is within the terms of comparatively recent Rules which empowered corporations of various kinds to become custodian trustees, to become trustees for the purpose, among other things, of the administration of the property of deceased persons.

In the present case the estate in question is that of a deceased person who was domiciled in Ireland, a Mr. Barlow, living in the county of Dublin. Mr. Barlow had by a will dated 1931 appointed the governor and company of the Bank of Ireland to be executor and trustee of his will. Nobody who knows the standing of the Bank of Ireland—a body which justifies, as far as I am able to judge of the matter, all its high traditions—will at all wonder that a man of property who is domiciled in the Irish Free State and is making his will and looking about for a corporation to act as trustee should select the Bank of Ireland. It seems to me as natural a thing as could occur to show the good sense of the testator.

(1) (1888) 38 Ch. D. 576, 582, 594.

1933

H. T. Barlow (Deceased).

The President.

Now the testator died last year, and after his death it was found that among other assets there were assets of the value of between 2000*l.* and 3000*l.* in England, and that, therefore, a grant of probate in this country was required. The Bank thereupon applies that probate may be granted to it. If the chairman of the Bank or one of its trusted officers had been the executor and trustee of the will the whole matter would have been perfectly simple. But the Bank is a corporation, and to be qualified to be an executor and trustee it must satisfy the provisions of the Rules and Orders now in operation, Rules and Orders made under a long series of statutes, which ultimately result in the very beneficial effect of enabling persons to select trustee corporations to administer their estates.

The whole question here is whether the Bank of Ireland is within the description of corporations empowered by the Public Trustee (Custodian Trustee) Rules, 1926, to undertake these duties. Now r. 30 of the Rules as they were embodied in 1926 defines the corporations which may become, in effect, executors or administrators, or which may become custodian trustees, and the rule limits that to a "corporation constituted under the law of the United Kingdom or of any part thereof and having a place of business there and empowered by its constitution to undertake trust business." (1) It is quite truly said by counsel for the Bank, with emphasis, in the interesting argument which I listened to, that the Bank of Ireland is a Bank having places of business within the United Kingdom. The Bank of Ireland is as trusted in Northern Ireland as it is in Southern Ireland, and is as trusted in London as it is in Dublin. That has not been disputed, but that is not the real test. The real test is whether the Bank is, that is whether the governor and company of the Bank of Ireland are, a corporation "constituted under the law of the United Kingdom or of any part thereof . . . . and empowered by its constitution to undertake trust business." (1) The two things must be read together, as counsel for the

---

(1) By the definition appended to r. 30 trust business means (inter alia) the business of acting as executor and administrator.

Official Solicitor pointed out. It must be a corporation constituted for the purpose, and it must be a corporation empowered for the purpose by the legislative authority which constitutes it.

Now first of all, is the Bank of Ireland, or the governor and company of the Bank of Ireland, a "corporation constituted under the law of the United Kingdom, or of any part thereof"? If that question had been asked in the year 1900 I think the answer would have been "Yes." I think that the Courts would have given a beneficent construction to the rule to be construed and would have seen that here was a corporation functioning in the area under consideration within the United Kingdom, whose constitution had been adopted by the Legislature of the United Kingdom and had received its sanction, and the United Kingdom being a single entity there was a corporation so constituted. But if the matter had arisen in 1900 the rule would not have been framed in the present words in which it is framed: "constituted under the law of the United Kingdom or of any part thereof." No part of the United Kingdom legislated with separate legislative authority in the year 1900. I am treating the Isle of Man and the Channel Islands as being outside what is properly known as the United Kingdom. In 1900 you would not have found those words, "or any part thereof." The words of the rule, "the United Kingdom or any part thereof," seem to have a flavour of the present time. From the situation in the United Kingdom it will be seen that it applies accurately and properly to the state of things in which a Legislature exists for Great Britain and a Legislature exists for Northern Ireland, and Northern Ireland is a part of the United Kingdom for which a Legislature exists. That seems to me to give a great deal of force to the observations that counsel made, that you cannot go back to the year 1800 or to the year 1900 and say: "Was this corporation constituted under the law of the United Kingdom?" You must either take the original constitution or you must take the existing constitution. You cannot go back to the earlier time, the past time, and you cannot go back to an intermediate time. You must see whether as originally constituted it had the powers, or whether as now constituted it has the powers " under the law of the United Kingdom or any part thereof." Then what is added with more definite force is this, that the corporation must be " empowered by its constitution " (the constitution given it by the Legislature having authority where it is) " to undertake trust business." Now the question would have been different if by some statute before the establishment of the Irish Free State the Bank of Ireland had been empowered to undertake trust business. It was not. The only power of the Bank of Ireland, under "its constitution to undertake trust business," is a power in a statute, to which I have been referred, with the legislative authority of the Irish Free State. It is here before me. It is perfectly clear in its terms. It seems to be a well drawn statute with a definite purpose, and it gives that power to be acted upon within the Irish Free State, but does not give that power to be acted upon in the United Kingdom.

I should have been glad if I had been able to reply affirmatively that, by reason of its original constitution under the legislative sanctions which have authorized it, the " governor and company of the Bank of Ireland " is a corporation within the meaning of the rule. I find it impossible to say so. The motion therefore fails.

Solicitors for the Bank of Ireland: *Freshfields, Leese & Munns.*

The Public Trustee.

R. M. M.

1933
May 1, 10.

INTRACT *v.* INTRACT OTHERWISE JACOBS.

Nullity—Impotence—Practice—Inspection of the Person—Dispensing Power of the Court—Law and Practice with reference to Inspection reviewed.

There is no support for the dicta found in certain decisions that inspection of the person is a rule of practice of universal application in cases of nullity of marriage on the allegation of impotence. Examination of the texts upon the subject and a review of the current of decision afford strong authority for the propositions that the Court has a dispensing power with regard to inspection, and that the Court can proceed to decision apart from inspection if there are sufficient materials available aliunde.

ADJOURNED SUMMONS.

The petitioner, J. Intract, claimed a decree of nullity of the marriage of himself and F. Intract otherwise Jacobs on the ground of her incapacity to consummate the marriage by reason of physical defect, and by particulars defined the incapacity as "invincible repugnance to the said act of consummation associated with increasing hysteria and a morbid perversion of her natural feelings." The answer of the respondent F. Intract traversed the allegation of her physical incapacity, made a counter-charge of physical incapacity against the petitioner, and prayed by cross-claim for a decree of nullity. The respondent as a person of unsound mind defended the suit by her guardian ad litem. In due course the petitioner took out the usual summons before a Registrar for the appointment of medical inspectors to examine and report upon the condition of the parties to the cause.

The Registrar referred the summons to the judge, and the judge adjourned it into Court.

Affidavit evidence of two medical men on behalf of the respondent was filed, the short effect of which was that the respondent was not in a fit condition mentally to undergo inspection, that inspection would have a serious effect on her mental condition, that she had already been examined by them, and that their evidence of her physical condition would be forthcoming if required for the purposes of the hearing.

F. Howard Collier for the petitioner. Inspection should be ordered. In divorce unsoundness of mind of a party has been held to be no bar: *Mordaunt* v. *Moncreiffe*. (1) It is difficult to see any distinction in cases of nullity, in which the practice of inspection has been followed since the days of the Ecclesiastical Courts, where the respondent was ordered by monition to submit to inspection: *H.* v. *C.* (2); Oughton, Ordo Judiciorum, De Causis Matrimonialibus, Tit. 217 (see Note A). It was laid down by Canon 105: "that credit be not given to the sole confession of the parties themselves however taken on oath either within or without Court" (Note B). In *Aleson* v. *Aleson* (3), though inspection was refused by Dr. Henchman, the ground was the absence of triennial cohabitation. And in *Welde* v. *Welde* (4) it was laid down by Dr. Bettesworth that there must be either triennial cohabitation or inspection, a decision which was confirmed by the Delegates in 1733. The effect of the cases is that the Court will make an order when it can.

Noel Middleton for the respondent. Inspection is not obligatory. In such a case as the present, an order would be embarrassing. The guardian ad litem is liable to the penalties of contempt and in costs in the event of non-compliance. In *Briggs* v. *Morgan* (1) Lord Stowell, then Sir William Scott, thought inspection the usual mode of proof, and in the same case *Harris* v. *Ball* (2) is referred to, where the Delegates appear to have taken the same view. Nevertheless the judge allowed the case to be decided on affidavits, and seems to indicate a discretion of the Court in the matter of inspection. In *Pollard* v. *Wybourn* (3) a decree was made against a man who had not obeyed the order for inspection, and a pronouncement of Sanchez (4) that inspection may be dispensed with is referred to in the report. I submit accordingly that the statement in that case that the Court always requires a certificate of the condition of the woman is obviously too sweeping.

---

(1) (1874) L. R. 2 H. L. Sc. 374.

(2) (1860) 29 L. J. (P. & M.) 81; 1 Sw. & Tr. 605.

NOTE A.—Ad probandum defectus judex, ad petitionem partis allegantis impedimenta (si talia sint quae ex corporis inspectione judicari possunt) compellere potest virum, ad exhibendum praesentiam suam, et ad ostendendum (in loco aliquo secreto per judicem assignando) pudenda sua, seu illos corporis defectus quos mulier objicit (si ex inspectione corporis apparere possint) medicis et chirurgis peritis prius judicialiter, in praesentia partis adversae de diligenter inspiciendo virum, et de referendo in scriptis eorum judicium, juratis.

NOTE B.—Canon 105: Forasmuch as matrimonial causes have been always reckoned and reputed among the weightiest and therefore require the greater caution when they come to be handled in judgment, especially in causes wherein matrimony, having been in the church duly solemnized, is required, upon any suggestion or protest whatsoever to be dissolved or annulled; we do strictly charge and enjoin that in all proceedings to divorce and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as possible) be sifted out by the depositions of witnesses, and other lawful proofs and evictions, and that credit be not given to the sole confession of the parties themselves, however taken on oath either within or without Court: See *Harrison* v. *Harrison* (1842) 4 Moore P. C. 96, 101.

(3) (1728) 2 Lee, 576.

(4) (1731) 2 Lee, 580.

An opinion also of Sir W. Wynne as advocate given in argument in *Norton* v. *Seton* (5) to the effect that inspection of a woman petitioner is indispensable is too sweeping having regard to the cases. In *Harrison* v. *Sparrow* (6) a decree was pronounced against a man who had not submitted to inspection, the Court (Dr. Lushington) proceeding in spite of his contempt. This decree was affirmed by the Privy Council. (7) The Lords, however, gave no opinion whether or not on Canon 105 inspection is necessary. In *Anonymous* (8), though the Court was pressed not to order inspection, the judge (Dr. Lushington) held that it would be an injustice to the other party not to order it. In *Serrell* v. *Serrell* (9) no order was obtained for the examination of either party, though the issue arose of the incapacity of one of them; nevertheless Sir Cresswell Cresswell proceeded to a hearing. *B.* v. *C.* (10) is remarkable, as the parties were permitted to choose their own inspectors without order. In *B.* v. *L.* (1) the Court waived compliance of a female respondent with an order for inspection till after the hearing. In *T.* v. *M.* (2) a female respondent refused inspection. There the judge speaks of inspection as "invariably required." That expression, it is submitted, is too strong. My submission is that in spite of unguarded expressions in some of the cases, the real conclusion to be drawn from the authorities is that the practice of inspection of the person is not obligatory on the Court, and that in cases where difficulty arises in compliance with an order or in which the Court is satisfied aliunde apart from adminicular proof of an inspector, want of inspection is not a bar to the progress of the suit. It is further to be borne in mind in considering the authorities that an allegation of invincible repugnance, which is a comparatively modern ground for a decree, renders inspection unnecessary. If there is no necessity for an order, it is submitted that the Court will not make an order.

---

(1) (1820) 2 Hag. Con. 324, 327, 329.

(2) Unreported.

(3) (1828) 1 Hag. Ecc. 725, 729.

(4) Quamvis utroque conjuge fatente impedimentum, ac triennio lapso, sanum consilium sit facere conjuges inspici; at id non est necessarium. Sanchez de Matrimonio, Lib. 7, disp. 108, No. 6.

(5) (1819) 3 Phill. Ecc. 147, 149.

(6) (1842) 3 Curteis, 1, 16.

(7) (1842) 4 Moore P. C. 96, 103.

(8) (1857) Dea. & Sw. 295, 304.

(9) (1862) 2 Sw. & Tr. 422.

(10) (1863) 32 L. J. (P. & M.) 135.

Cur. adv. vult.

May 10. LANGTON J. This was a summons adjourned into Court for argument upon a point of practice and procedure. It is a point that is difficult and unusual rather than a point of great general importance.

The petitioner in the case is a husband who seeks a decree of nullity, and the ground stated in his particulars which is the effective ground of his case is that of invincible repugnance. The answer is a denial, and the counter allegation of incapacity.

By the present summons the petitioner asks for the appointment of medical inspectors to make the customary examination. Now the respondent wife is represented in the litigation by her guardian ad litem on the ground that she is a person of unsound mind, though not so found by inquisition. Two joint affidavits by her medical advisers dated respectively March 16 and 30 have been filed on behalf of the respondent, and the affidavits prove that the respondent is not at present in a mental state to allow of the

(1) (1869) L. R. 1 P. & M. 639. (2) (1865) L. R. 1 P. & M. 31.

1933

INTRACT
v.
INTRACT.

Langton J.

desired inspection, and the medical gentlemen who made the affidavits hold out no hope that an examination of this kind could be safely conducted, that is safely in consequence of the health of the respondent, within any reasonable time. The point therefore arises whether any such inspection is a necessary part of the procedure of the Court, or whether, on the other hand, the Court has a discretion in a proper case to dispense with this customary, and no doubt most useful, step in the procedure.

Before considering the authorities in the matter I may say that in the present case it certainly appeared to me that no injustice could really be done by the omission of this examination, for two reasons. First of all there is no actual effective claim in respect of malformation, and obviously the claim as to repugnance would depend more on evidence that is not strictly medical than upon any question of medical inspection. Secondly, because as late as October, 1930, one of the same two medical advisers who made the affidavits, to which I have referred, made a complete examination of the same character as that which would be conducted by the inspectors appointed by the Court, and both sides are willing that the results of this examination should be utilized in evidence if necessary. It really amounts to this, that to begin with I very much doubt whether from the point of view of justice between the parties it will ever be necessary to have an inspection at all, and secondly, if the decision of any question calling for inspection did become necessary between the parties there is already available evidence which could be used, and which both sides are willing should be used. The matter, of course, does not end there, because medical inspection by the officers of the Court is made for the purpose of the Court's own protection. It is a most valuable safeguard against collusion in cases of this class, and I hope that nothing I am saying to-day will diminish the importance attached to this kind of inspection, or make it, in any way, simple for people to avoid this customary step.

The circumstances in the particular case are unusual, and what is done in an unusual case is not to be taken as being a precedent for ordinary and customary cases where a long established procedure has been quite rightly followed. Now the statutory powers of the Court have been examined in argument, and they throw very little light upon the matter. I may say, before passing to the consideration of the authorities and the law on the matter, that the Court is very much indebted to counsel for the respondent for his most careful review of what I believe to be the whole of the relevant matter in the way of authorities, and his industry and learning put generously at my disposal have very much lightened my task. As I say, the statutory powers of the Court are found in the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), ss. 32, 103, and those sections, without reciting them here, are in far too general terms to throw any particular light upon this special problem. One has to pass then, in order to get light upon the matter, to the older authorities and obtain, as far as one can, the ecclesiastical view. For that purpose counsel called my attention to a great number of authorities, but I gather that his view was, as certainly my view is, that the matter is really summed up in two and a half lines of not very classical Latin in Sanchez de Matrimonio. Counsel pointed them out to me in a note to *Pollard* v. *Wybourn.* (1) It is a case determined in the Consistory Court of London. The note in question is at the bottom of p. 729. It is in these words: "Quamvis utroque conjuge fatente impedimentum, ac triennio lapso, sanum consilium sit facere conjuges inspici; at id non est necessarium." Giving these words perhaps a free, but I hope sufficiently exact interpretation, that would seem to show that an inspection is a prudent procedure, or perhaps a wise course of action. But obviously the words "at id non est necessarium" make it quite clear that in the author's view it is not a necessary step in the procedure. Now that is, so far as the Ecclesiastical Courts are concerned, I understand, both the law and the prophets combined, because Sanchez is undoubtedly a first-rate authority upon a matter of this kind. I turn then to Oughton's Ordo Judiciorum, De Causis Matrimonialibus, Tit. 217, p. 320, and

---

(1) 1 Hag. Ecc. 725.

1933

INTRACT
v.
INTRACT.

Langton J.

there again without reading the Title in extenso it is clear from the expressions used that the Court has power to order an inspection: "compellere potest virum," for example, are the words used, and stress is laid upon the power of ordering inspection of the man, and the value of the inspection, particularly of the man. But most of that Title really deals with the defects of the male. Again it does not say even there, where the inspection is considered a valuable part of the procedure, that it is an absolutely necessary part of the procedure; it shows power, but makes no suggestion of obligation on the part of the Court.

Now to obtain, as far as one can, expressions from judges of eminence upon this matter. We have, on the one hand, a case tried by Lord Stowell, a case of *Briggs* v. *Morgan* (1), in which it is quite clear that although the pleading is in the terms of "incurable natural mal-conformation and bodily defects in the person of the woman" the case proceeded upon quite different lines without any inspection at all. When I say it proceeded upon a different line, it proceeded upon quite a different line from what would be the ordinary line to-day. Lord Stowell, Sir William Scott as he then was, considered the case upon the evidence and upon probabilities, and he was quite content to decide the case upon the evidence and the probabilities without subjecting the woman in the case to any inspection at all. That, to my mind, is a very strong authority in favour of the line contended for here—namely, that there is no necessity for an inspection of this kind if the Court thinks (as it would not think lightly) that in all the circumstances this is a case for this concession. Another quite strong case in the same line is a case in which Lord Brougham gave judgment. That was *Harrison* v. *Harrison*. (2) Lord Brougham says this: "It has been insisted by the counsel for the appellant, that the confession of non-consummation is not sufficient to satisfy the 105th Canon, and that there must be some extrinsic proof, and for this purpose, proof by inspection is said to be essential." The point was quite clearly and distinctly raised. "Their Lordships," Lord Brougham continued, "give no opinion on this construction of the Canon; for if adminicular proof is requisite, they think that the circumstance of the appellant's having taken a legal opinion on the validity of the marriage, which he admits in his answer, coupled with the confession of non-consummation, and his refusal in the first instance to undergo inspection, is sufficient extrinsic proof; and being satisfied that there is no collusion between the parties, they affirm the decree of nullity, causa impotentiae." From that counsel derives, and I think rightly, two things. First of all that this class of evidence is only adminicular, and secondly that certainly it was not considered by Lord Brougham, before whom the point was directly raised, as being an essential requisite to the decree. That is even stronger I think than the precedent in the case before Lord Stowell. Another case that throws light upon the matter at a later date is *Serrell* v. *Serrell and Bamford.* (1) That is as late as 1862. The importance of the case is that as late as 1862 it is quite clear that in that instance there was no examination by medical men at all, or rather by medical men appointed by the Court, and there again the point here in question was inferentially raised, because the parties sought to put in evidence medical opinions from their own sides and objection was taken to it and the objection was overruled. So that tracing the matter in that way (I am taking a selection of the cases put before me as being the more convincing and clearer of the cases) there seems to be very strong authority in favour of the proposition for which counsel contends, that there is at least a dispensing power and no necessity for this step in the procedure in order to make the matter regular. Against that there are certain dicta from judges as eminent as Dr. Lushington and Sir William Wynne; but the dicta in each case—I have looked carefully at those cases—are of a wide character. For example, Sir William Wynne says: "Which is the method of proof upon which these cases always proceed." That is an opinion of his cited in the case of *Norton* v. *Seton* (2) But that is quite obviously the class of observation which any judge might make without attempting to decide the point one way or another. It is quite true to say that cases do always proceed in that way, but the fact that there is a dispensing power is not in any way negatived by the fact that the usual method of proceeding is something else. Similarly with Dr. Lushington. His opinion, in which he referred to the usual method in which these cases proceed, is much too wide in my view if it is to be taken as laying down an exact doctrine. In neither case, I think, are the dicta of Sir William Wynne or Dr. Lushington really intended to be a statement of a canon or principle; they are merely passing references to what is the customary practice, and therefore they ought not to be weighed—and I have no doubt that the authors of the expressions would not wish them to be weighed—against the quite clear expression of Lord Brougham and Lord Stowell backed, as they are, by the old Ecclesiastical authorities.

---

(1) 2 Hag. Con. 324.

(2) 4 Moore P. C. 96, 103.

---

(1) 2 Sw. & Tr. 422.

(2) 3 Phill. Ecc. 147, 149.

For those reasons I have come to the conclusion that in this case this step can, and ought to be, dispensed with in the case of the respondent. The position is that counsel for the petitioner is asking that medical inspectors should be appointed. Counsel for the respondent is not, in any sense, objecting to that, and the matter has reached this stage, as I understand, that it is felt advisable that the matter should be dealt with by the Court in order that the officials should be fully instructed whether it would be in order to proceed without this well known and customary step of inspection in the case of the respondent. I think in the circumstances that I can say that it can be dispensed with in her case, and that the matter should proceed without it.

Solicitors for the petitioner: *Needham & Barrow, for Waller & Milburn, Sunderland.*

Solicitors for the respondent: *Robinson & Bradley, for Smirk & Thompson, Newcastle-upon-Tyne.*

R. M. M.

Applied. James Bibby, Ltd. *v.* Woods. [1949] 2 All E.R. 1.

Applied. James Bibby Ld. *v.* Woods. [1949] 2 K. B. 449

MASON *v.* MASON (COTTRELL CITED).

MASON *v.* MASON AND COTTRELL (TRIST INTERVENING).

1933
May 8, 15.
C. A.
May 30, 31.

Divorce—Practice—Wife's Costs—Intervener—Set-off by Husband against Wife's Costs of Costs ordered to be paid by Wife to Intervener and assigned by Intervener to Husband—Wife's Costs ordered to be Paid to Wife's Solicitors—Lien of Wife's Solicitors—Garnishee Order on Bank Balance of Husband—R. S. C., Order XLV., *r.* 1; *Order* LXV., *r.* 14*—Solicitors Act*, 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 69.

Where, after an order has been made for payment into Court by the husband of a sum for securing the wife's costs of his proceedings for divorce, an order is made at the hearing extending her security, the wife is not thereby made a secured creditor for any sum in excess of the money in Court, but if she obtains an order for payment of her costs, and when taxed they exceed the money in Court, she will be entitled to recover the excess from the husband: *Palmer* v. *Palmer* [1914] P. 116 discussed.

Where in divorce proceedings the usual order is made for payment by the husband of the wife's costs to her solicitors, they are not thereby made the creditors of the husband, but they are merely entitled to receive payment on behalf of the wife.

So held by the Court of Appeal, affirming Lord Merrivale P.

On cross-petitions between a husband and wife which were consolidated, an order was made at the hearing that the husband's petition should be dismissed with costs to the wife on the issue of her adultery and an intervener was given her costs against the wife. Before the trial orders had been made under which a total sum of 340*l.* was brought into Court by the husband to secure the wife's costs, and at the trial in November, 1932, the wife obtained an order for extension of the security. On March 10, 1933, an order was made for payment of the wife's costs (less the sum paid into Court) to the wife's solicitors; but the husband, having previously taken an assignment of the intervener's taxed costs, set them off against the sum he was ordered to pay and only paid the balance. The wife's solicitors then obtained a garnishee order nisi against the husband's bank account in respect of the amount of the set-off. Subsequently Lord Merrivale P. discharged the order nisi.

On appeal:—

Held (affirming the decision of Lord Merrivale P.), (1.) that the wife's solicitors were not persons who had obtained a judgment or order against the husband for recovery or payment of any sum within Order XLV., r. 1, so as to be entitled to a garnishee order; and (2.) that they had no lien upon the costs ordered to be paid by the husband to the wife that entitled them, having regard to Order LXV., r. 14, to defeat the husband's right of set-off, in the absence of a declaration under the Solicitors Act, 1932, s. 69, giving them a charge on those costs.

C. A.
1933

MASON
v.
MASON.
MASON
v.
MASON
AND
COTTRELL.

SUMMONS to discharge garnishee order nisi.

These were consolidated suits. The wife, Muriel Valerie Mason, petitioned for restitution of conjugal rights, to which the husband, Stanley Charles John Mason, pleaded just cause and counter-charged the wife with adultery with F. C. Cottrell. He made a like charge against the wife in a cross-suit for divorce in which he sued Cottrell as co-respondent. The wife in answer to her husband's suit charged her husband with adultery with a woman named Trist, and also with a woman unknown. Cottrell defended the suit of the husband, and Trist intervened to defend the charge made by the wife. The suits having been consolidated were tried before Lord Merrivale P. and a special jury on November 25, 28 and 29, 1932, and a verdict was given against all the charges of adultery. On these findings the co-respondent Cottrell was dismissed from the husband's suit with costs, and the husband's petition was dismissed with costs to the wife on the issue of her adultery, on which she succeeded, but not on the issue of the adultery of the husband with the intervener Trist and the woman unknown, on which the wife failed. Trist was given her costs against the wife. Before the trial orders had been made on May 6 and November 16, 1932, that the husband should pay sums of 140*l.* and 200*l.* respectively into Court as security for the wife's costs ; and on the second day of the hearing the wife's counsel applied for an extension of the security, which was granted.

A deed of separation between the spouses was subsequently executed, and the suit of the wife for restitution of conjugal rights was dismissed on March 10, 1933.

Upon taxation, the costs of the intervener Trist against the wife were taxed at 244*l.* 6*s.* 9*d.*, and an order for payment was made on February 27, 1933. The wife's costs were taxed at 706*l.* 1*s.* 4*d.*, and those of the co-respondent Cottrell at 177*l.* 0*s.* 11*d.* As to each of these bills an order for payment was made against the husband on March 10, 1933. As against the taxed costs of the wife there had been lodged in Court by the husband under the usual order for security

340*l*. The wife failed to pay the costs of the intervener, and on March 8, 1933, the husband took an assignment of these costs from the intervener, and next day gave notice of the assignment to the wife's solicitors, and on March 21, 1933, the husband paid Cottrell's costs, 177*l*. 0*s*. 11*d*. He also paid to the wife's solicitors 121*l*. 14*s*. 7*d*., being, as he contended, the full amount of costs due on balance from him to his wife, asserting his right to set off against the wife the intervener's costs of which he had become assignee, and taking credit for the fund lodged by him in Court as security for the wife's costs—namely, 340*l*.

The order to pay the wife's costs which had been served on the husband on March 14 was in a common form directing payment to the solicitors of the wife (naming them). On March 23 an affidavit was filed on behalf of the solicitors setting forth the order as an order that the husband should pay a certain sum to the solicitors (by their firm name, but without adding their capacity of solicitors to the wife), and on this footing Wm. White & Co., the solicitors for the wife, applied for and on March 28 obtained, as of course, a garnishee order nisi as judgment creditors of the husband, attaching by way of execution all moneys due to the husband from his bankers, the Midland Bank, as garnishees. The garnishee order nisi was the appropriate course under the Rules of the Supreme Court, Order XLV., r. 1, for initiating proceedings for garnisheeing so much of the husband's bank balance as would satisfy the claim of the solicitors for the sum of 244*l*. 6*s*. 9*d*., part of the wife's taxed costs, which the husband sought to meet by a set-off of a like amount found due from the wife to the intervener and since by the intervener assigned to him the husband.

On March 27, 1933, the husband took out the present summons to discharge the garnishee order nisi, asking that the solicitors of the wife should pay the husband's costs in connection with the order. The summons was adjourned into Court.

Hilbery K.C. (*T. Bucknill* with him) for the husband. The question is whether the wife's solicitors are in any way judgment creditors of the husband for the taxed costs. If they are not his judgment creditors they are not entitled against the garnishees. The award of costs is an indemnity to the wife only, not to her solicitors: *Gundry* v. *Sainsbury.* (1) The solicitors look to her for payment. The solicitors not being creditors, the wife herself is the only party to whom garnishee proceedings are open: *In re a Debtor.* (2) An actual judgment for the intervener's costs being in existence, the assignment of them was a valid legal assignment of a present debt and the husband is entitled to set them off against the wife's claim: *Hambleton* v. *Brown.* (3)

H. B. Durley Grazebrook for the wife. The solicitors have a lien after the order for security. It will not be interfered with: *Hall* v. *Hall.* (4) The husband is not entitled to interfere with the lien by asserting a set-off against a third party, the wife. The order is plainly an order to pay to the wife's solicitors.

Hilbery K.C. in reply. There is clear authority that the Court can override a lien in the matter of a set-off in a fair and reasonable case: *Puddephatt* v. *Leith* (*No.* 2). (5)

Cur. adv. vult.

May 15. THE PRESIDENT (LORD MERRIVALE) [after stating the facts:] The garnishee order nisi was challenged by the husband on two grounds: firstly, that the wife's solicitors were not creditors of his so as to be entitled under the Rules of the Supreme Court, Order XLV., r. 1, to attach moneys due to him; and secondly, that he had satisfied his liability under his wife's judgment against him by the payment of 121*l.* 14*s.* 7*d.*, as he asserted a right to set off the amount of the intervener's costs of which he had taken an assignment.

As to the first objection to the garnishee order nisi, what has to be determined is whether the wife's solicitors were persons who had obtained a judgment or order against the husband for recovery or payment of money—that is, were they his creditors? The order relied on is that of March 10, 1933, that the husband "do within 7 days pay to Messrs. White & Co., the solicitors of the wife, the sum of 366*l.* 1*s.* 4*d.*, being with the sum of 170*l.* still in Court and 170*l.* already paid out the amount of the wife's costs as taxed and certified." An affirmative answer to the question I have formulated would seem to involve a conclusion that the solicitors and the wife had each obtained a judgment or order against the alleged debtor. If so, each would be a competent applicant for the garnishee order and entitled under the terms of Order XLV., r. 1, upon affidavit by himself or his solicitor "to attach the moneys due to the debtor." In the everyday practice of this Division the application by the solicitor for payment by the husband of the wife's costs is taken to be the application of the wife. If this were not so, it would seem that the wife's solicitor, with no misconduct on his part as a solicitor, might be personally condemned in the costs of an unsuccessful application. In my view the person who is entitled to take garnishee proceedings is the actual creditor. A somewhat similar question arose in the Court of Appeal in 1929: *In re a Debtor.* (1) There, upon an order in divorce for payment by the co-respondent to the solicitors of the petitioner of the petitioner's costs of the suit, the solicitors proceeded in bankruptcy against the co-respondent, and it was objected that they were not creditors. The judgment of the Court did not proceed upon this ground, but in the course of the judgment of Lord Hanworth M.R. these words occur: "the person at whose suit proceedings are taken must be the principal, the person in whose interest those proceedings are necessary. In my opinion the petitioning husband in this case was the person who was really the principal, for whose indemnity legal proceedings were necessary. The solicitors were merely acting as a necessary part of the machinery, under which the sum enured for the benefit of the petitioner; but they were not the principals as against the debtor." This was not a decision on the present state of facts, but it appears to me to

---

(1) [1910] 1 K. B. 645, 649.
(2) [1929] 2 Ch. 146, 152.
(3) [1917] 2 K. B. 93.
(4) [1891] P. 302.
(5) [1916] 2 Ch. 168.

(1) [1929] 2 Ch. 146, 152.

support the contention raised on the part of the husband in the present case, and my conclusion upon this matter is that the solicitors were not entitled to become applicants as of their own right under Order XLV., r. 1.

The main question between the parties, however, is that of the husband's right to set off against his liability under the wife's order for costs against him the debt of costs due from the wife to the intervener which the intervener has assigned to him.

That the decreed right to costs was a chose in action which the intervener had power to assign could hardly be denied. The assignment was made after taxation, and the considered judgment of Atkin J., now Lord Atkin, in the case of *Hambleton* v. *Brown* (1), seems to me to place beyond doubt the right to assign which the intervener has purported to exercise. The actual assignment, as one of the facts in the case, was not impugned on any ground affecting its validity as between the intervener and the husband. Whether the right of set-off asserted on the husband's behalf existed and was effectually exercised depends upon the nature and extent of the wife's rights as to costs under the decree and the rights of the solicitors in respect thereof as claimants in their own interest.

The case for the solicitors is put upon two grounds. They assert that in point of law a wife's solicitors in proceedings under the Matrimonial Causes Acts have a beneficial interest in the debt created by any decree for costs made in her favour and, beyond that, that they have a lien either under the Solicitors Act or otherwise under the general law.

Under the Solicitors Act, 1932, s. 69, a solicitor may, almost as of course, secure for himself a charge upon property "recovered or preserved through his instrumentality" for his taxed costs in any suit in which he acts for the client. Any court before which the solicitor has been employed to prosecute or defend a suit may declare the solicitor's right to the charge, but the charge does not exist until the declaration has been made, and no such declaration has been made in

(1) [1917] 2 K. B. 93.

the present case. In view of that fact it is not necessary to consider whether the chose in action created by the decree for costs is property recovered or preserved within the meaning of the statute. At the time when the husband's right of set-off was asserted no charge upon it had been declared.

As to a set-off of costs the general rule of the High Court is that contained in Order LXV., r. 14: "a set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien." The operation of this rule is demonstrated in a judgment of Younger J., now Lord Blanesburgh, in the case of *Puddephatt* v. *Leith* (*No.* 2) (1), which was discussed in the argument before me. The introduction of the rule established a definite principle of general application where there was formerly much conflict in practice. One of the many judgments which that controversy induced was delivered by Cockburn C.J. in *Mercer* v. *Graves* (2), when the learned Chief Justice said with regard to the solicitor's claim of a lien in respect of costs: "there is no such thing as a lien except upon something of which you have possession. . . . Although we talk of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the Court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs."

The provisions of Order LXV., r. 14, seem to apply prima facie to proceedings by way of set-off in a cause, and do not at any rate enlarge the general rights of the solicitor as solicitor. Assuming no effectual set-off to have been made before the present application came on for hearing, the matter would be one for the exercise of judicial discretion upon consideration of the relevant facts. It was thus dealt with in *Hall* v. *Hall* (3) and *Puddephatt* v. *Leith* (*No.* 2). (4) I shall revert to this matter later.

The controversy between the wife's solicitors and the husband, as the matter developed here, turned in reality not

(1) [1916] 2 Ch. 168.
(2) (1872) L. R. 7 Q. B. 499, 503.
(3) [1891] P. 302.
(4) [1916] 2 Ch. 168.

upon provisions of the Solicitors Act but upon the privileged position of the solicitors as against the husband in a matrimonial cause. The Matrimonial Causes Act, 1857 (20 & 21 Vic. c. 85), s. 51, empowered the Court to make such orders as to costs as to the Court might seem just, and the procedure of the Ecclesiastical Courts, which had rendered provisions for the wife's costs obligatory upon the husband in normal cases, was given effect throughout the jurisdiction under the Matrimonial Causes Act, 1857. Very soon after the passage of this Act it was held that, as in earlier times, the husband might be ordered to provide for his wife's costs day by day: *Holt* v. *Holt.* (1) The principle involved was declared by Cotton L.J. at a later date in *Robertson* v. *Robertson* (2): "when the wife has to take proceedings against her husband, or he against her—all her property being in him—she ought to be provided . . . . with the means of bringing her case before the Court or of properly defending the case brought against her." The full Court under the Act of 1857 had stated the same principle in the well known case of *Keats* v. *Keats and Montezuma* (3): "The wife should be enabled to bring her case to a hearing and defend herself." In a case of *Evans* v. *Evans* (4), at the same early period, the Court had held that "the wife's proctor has a lien" on the sum paid into Court in respect of the wife's costs.

There are, however, limitations upon the privilege of the wife and the incidental right of the "proctor"—now the solicitor. The privilege was limited to requiring the provision by the husband of the money needed for the purpose specified. Under the Matrimonial Causes Acts the Court orders payment into Court of specified amounts before and in proper cases during the hearing, and/or the giving of security for prescribed amounts in lieu of actual payments into Court. This is everyday practice, and it was followed in the present case. Certain costs were taxed and paid and payment into Court of estimated costs was ordered. A few days before the hearing there was an order which included the estimated amount of the costs of the hearing. These orders were duly complied with. In the result there was in Court at the hearing 340*l.* paid in by the husband as security for the wife's costs. Up to this amount the wife was a secured creditor in respect of the costs ultimately ordered to be paid to her by the husband, and the security enured for the benefit of her solicitors. They have accordingly taken out of Court the whole sum the husband had been ordered to pay in.

---

(1) (1858) 28 L. J. (P. & M.) 12.

(2) (1881) 6 P. D. 119, 125.

(3) (1859) 1 Sw. & Tr. 334, 358.

(4) (1859) 1 Sw. & Tr. 328, 331.

I have to determine whether the solicitors have the right they assert in respect of the unpaid balance of the wife's costs ordered to be paid by the husband by the order dated March 10, 1933. The final order in the suit was made on December 5, 1932; the wife's petition was dismissed on March 10, 1933. No new or extended order for security for the wife's costs could be made now, and there was no suggestion before me of any right of the wife in that way. Looking at the orders as they stand, the wife is the husband's creditor for the unpaid balance of her taxed costs, but is not a secured creditor, and her solicitors can have no larger right than hers. In my judgment the intervener's assignment to the husband of the wife's debt to her, notice whereof was given to the wife, entitled the husband to rely upon the debt so assigned as a set-off against his debt of equal amount. I hold, therefore, that the wife's solicitors as such have no valid claim to recover from the husband the sum in question. Assuming the question of discretion to arise in respect of the right of set-off as between the intervener and her assignee and the wife and her solicitors under the provisions of Order LXV., r. 14, I shall exercise that discretion in favour of the husband. I take into consideration the whole course of the litigation, the nature of the charges against the husband and the intervener, and the mode in which they were originated and pursued, and the fact that after all the litigation now in question the marriage tie between the husband and wife remains in force, with serious effects in respect of liability.

Garnishee order nisi discharged.

Solicitors of wife to pay costs of application to discharge, including costs of Bank.

R. M. M.

The wife appealed. The appeal was heard on May 30, 31, 1933.

Serjeant Sullivan K.C. and *H. B. Durley Grazebrook* for the appellant. The position of an innocent wife's solicitor in the Divorce Court is peculiar. He is the creditor of the husband for "necessaries" supplied to the wife at common law: *Ottaway* v. *Hamilton* (1), and the Divorce Acts have not taken away the right of the wife to pledge the husband's credit. (2)

Our contention is that the wife's solicitors are creditors of the husband in respect of her costs and can therefore obtain a garnishee order to enforce their payment. In the Divorce Court the order is for the husband to pay costs to the solicitor—not to the wife—because, before the Married Women's Property Acts, any other order would have been nugatory. The cases show that the Court has not been unmindful of the position of the wife's solicitors, and they receive the costs in their own right. In *Robertson* v. *Robertson* (3) it was held that in a divorce suit, the costs of the wife payable by the husband were not limited to the amount paid into Court or secured by the husband for that purpose. The solicitor in that case was the solicitor for a guilty wife, and it was held that he was not to be prejudiced by that fact. That case supports the appellant's contention: see also *Kemp-Welch* v. *Kemp-Welch and Crymes.* (4)

[ROMER L.J. The solicitors are not parties to the proceedings.]

Where the parties resume cohabitation before any order is made for costs the solicitor may himself apply for payment of them by the husband: *Nairne* v. *Nairne.* (5) In *Jinks* v. *Jinks* (6) it was held that a wife, petitioner in a suit for judicial separation, could not, by merely giving notice of change of solicitors, deprive the solicitor who had hitherto represented her in the suit of his right to carry in his bill and tax his costs in the Divorce Division, so as to compel

(1) (1878) 3 C. P. D. 393.
(2) Ibid. 399.
(3) 6 P. D. 119.
(4) [1910] P. 233.
(5) (1901) 18 Times L. R. 16.
(6) [1911] P. 120.

him to have recourse to an action at common law against the husband for necessaries: see also *Sullivan* v. *Sullivan*. (1)

[LORD HANWORTH M.R. These cases show that the rights of solicitors are rights which have accrued to the wife in the Divorce Court.]

Again, if the wife's solicitors are not beneficially entitled under the order for payment of the wife's costs to them, they have the ordinary common law lien on them: *Hall* v. *Hall* (2), and it cannot be defeated even by the connivance of the client: *Ormerod* v. *Tate* (3), in which the debtor, who had collusively paid the creditor under an award, had to pay again to the solicitor. There has been here no declaration of charge under the Solicitors Act, 1932, s. 69, but that section merely supplies a new remedy in regard to an existing right: *In re Born* (4), a case under the corresponding section of the Solicitors Act, 1860, and *In re Meter Cabs, Ld.* (5) The common law lien is recognized in Order LXV., r. 14, but it provides that "a set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." While, however, that recognizes a set-off of cross-orders or judgments, the judgment obtained by the intervener against the wife cannot be set off against the wife's judgment against the husband. All that the husband obtained by assignment from the intervener was a debt and not a judgment, and it is of no greater validity for the purpose of a set-off than any other debt. Even where the rule applies it will not be used in the Divorce Court against a wife's solicitor: *Hall* v. *Hall*. (2)

[ROMER L.J. I feel great doubt whether the wife's solicitors can apply to enforce the judgment for costs in the divorce proceedings.]

These are in form the wife's proceedings, but in fact the order was for payment of the wife's costs to her solicitors.

[ROMER L.J. Only in right of the wife.]

(1) [1912] 2 I. R. 116.
(2) [1891] P. 302.
(3) (1801) 1 East, 464.
(4) [1900] 2 Ch. 433.
(5) [1911] 2 Ch. 557, 561.

C. A.
1933

MASON
v.
MASON.
MASON
v.
MASON
AND
COTTRELL.

Sometimes matters of procedure obscure rights. Here there was not only money in Court to secure the wife's costs down to the first day of the trial, but an order was obtained extending the security. The effect of that was to make all the costs secured: *Palmer* v. *Palmer*. (1) In *In re a Debtor* (2) the Master of the Rolls expressed the view that where the Divorce Court had ordered payment by the co-respondent to the petitioner's solicitors of his costs of the suit that did not make the solicitors "creditors," who under s. 4 of the Bankruptcy Act, 1883, could present a petition for bankruptcy. The other members of the Court expressed no opinion on that point, and the case has no application here, for, while a co-respondent is not indebted to a husband's solicitor, a husband is certainly indebted to the solicitor of an innocent wife. Here there is a final order on the husband to pay the wife's solicitors a sum of money. They, therefore, can enforce it, and are creditors for that sum of money. They can give a good discharge for it and keep it for themselves, and owing to the order extending the security they are secured creditors for the whole of it.

Hilbery K.C. and *T. Bucknill* for the respondent. As in an action in the King's Bench or Chancery Division, there is only one person in a matrimonial suit who is entitled to ask for costs. That is the party to the suit. The costs are awarded to a party on the theory of indemnifying him against the costs incurred by him with his solicitors: *In re a Debtor* (2); *Gundry* v. *Sainsbury*. (3) That was so in this case and, if so, it is impossible to say that this wife's solicitors are in the position of judgment creditors in respect of the wife's costs. The order for payment of the costs to them merely made them the agents for the wife to receive the costs, and not persons who had "obtained a judgment or order for the recovery or payment of money" within Order XLV., r. 1. The Matrimonial Causes Rules, 1924, r. 91, show that the costs are dealt with as the wife's costs. The form of the order cannot supersede the judgment giving the wife her costs of the issue on which she succeeded. There cannot be two judgment creditors for the same debt. It is to be noted that under the Common Law Procedure Act, 1854, judgments alone formed the basis of garnishee proceedings.

---

(1) [1914] P. 116.

(2) [1929] 2 Ch. 146.

(3) [1910] 1 K. B. 645.

[LORD HANWORTH M.R. Even if that be so, there still remains the question of the effect of the order extending the security.]

It is to be noted that in this case the wife was only given her costs on the issue on which she succeeded, and the order differed materially from that in *Palmer* v. *Palmer*. (1) The effect of the order extending the security is not to compel the husband to bring further money into Court, but to enable the wife, if at the conclusion of the trial she obtained an order in her favour for costs, to recover her costs freed from any limitation on the amount. It does not make that wife or her solicitors secured creditors for the costs not secured by the money in Court. That is made clear by the form of order for payment of the wife's costs in *Palmer* v. *Palmer*. (2) But for the order for extension, the wife could not have recovered in respect of her costs anything beyond the money in Court by way of security: see the report of the Registrars referred to in *Palmer* v. *Palmer* (3) and compare *Robertson* v. *Robertson* (4) and *Smith* v. *Smith*. (5) The form of order mentioned in *Palmer* v. *Palmer* (1) is accepted in *Betton-Bright* v. *Betton-Bright* (6), and it is there stated that the order where no further application for security has been made "is that the costs are limited to the amount of the security." The wife's solicitors are not therefore in the position of secured creditors, and they are not entitled to enforce the order for payment of costs by a garnishee.

[They also referred to *Mercer* v. *Graves*. (7)]

LORD HANWORTH M.R. This appeal raises an interesting point, which has been well presented to the Court on both

(1) [1914] P. 116.
(2) Ibid. 117.
(3) Ibid. 120.
(4) 6 P. D. 119.
(5) (1882) 7 P. D. 84.
(6) [1920] P. 338, 345.
(7) L. R. 7 Q. B. 499.

C. A.
1933

MASON
v.
MASON.
MASON
v.
MASON
AND
COTTRELL.

Lord Hanworth
M.R.

sides. The appeal fails. [His Lordship then stated the facts.] The only ground on which the wife's solicitors could claim to attach moneys in the husband's banking account and to have the garnishee order made absolute, was that they fulfilled the conditions contained in Order XLV., r. 1, that they were persons who had "obtained a judgment or order for the recovery or payment of money"; and they claim to have fulfilled that condition because of the order of March 10, 1933, for payment to them "of the sum of 366*l.* 1*s.* 4*d.* being with the sum of 170*l.* still in Court and 170*l.* already paid out, the amount of the wife's costs as taxed and certified." And they say further that the order made on November 28, 1932, which, to use the exact terms, extended the security in favour of the wife, was something which put them in the position of secured creditors, because they were the persons entitled to receive payment of the wife's costs, and the reason why security had been ordered and extended was because the wife had become and was becoming indebted to them in respect of the costs of the petition.

First, what was the meaning of the order extending the wife's security made on November 28, 1932? It is claimed by Serjeant Sullivan that the effect of that order was to put the wife in possession of security for her costs and that from and after that time, whether or not any money was paid into Court, or a bond given to secure the costs, the effect and operation of that order was to place the wife on the sure ground of having in all cases a fund into which she could dip for the payment of her costs. On the other hand, it is said by Mr. Hilbery that so to interpret the order is to misunderstand the well settled practice of the Divorce Court.

Attention has been called to *Robertson* v. *Robertson* (1), a case which went to the Court of Appeal and at first sight seems to give colour to the contention that as a result of the order the wife had a right to be paid all her costs and to have those costs secured to her, whatever the ultimate order of the Court might be. But it is plain from the criticism of that decision by Hannen J. in *Smith* v. *Smith* (2) that the

(1) 6 P. D. 119. (2) 7 P. D. 84.

terms of that judgment were not accepted in full; and that appears to accord with the practice of the Divorce Court. In *Palmer* v. *Palmer* (1) Sir Samuel Evans calls attention (2) to both those cases, and also to the order which, in November, 1908, Lord Gorell directed should be what is called "the usual order for wife's costs": "And it is further ordered that the petitioner do pay to the respondent her taxed costs not to exceed the amount ordered to be paid into Court or secured for the wife's costs of hearing, together with such further sum as, in the opinion of the taxing registrar, would have been allowed if the duration of the trial had been known at the time of such previous order." That order is not easy to construe, because the words "not to exceed the amount ordered to be paid into Court or secured for the wife's costs of hearing" seem to impose or recognize a limitation of the amount up to which the wife is secured; and then the order seems to go on to extend the wife's right to costs to such further sum as, in the opinion of the taxing registrar, would have been allowed if it could have been ascertained beforehand how long the trial would last.

After careful consideration of the terms of that order and of the reason why it was so drawn up, we have come to the conclusion that the interpretation suggested by Mr. Hilbery is right. The order extending the security does not mean that there is to be a further sum actually paid into Court; nor does it mean that the wife thereafter is to be a secured creditor for all her costs. It means that she is released from the limitation on her costs which apparently has been imposed upon her, so that, if it is found thereafter that her costs will amount to a sum exceeding the amount provided before the trial takes place, she is not to be held bound by this estimate originally made of what her costs would be. Released then from that limit, she can still recover a larger sum in respect of costs if and when she obtains an order at the trial of the petition for payment to her of a larger sum of costs than had been estimated for before the trial took place. To put a different construction upon the order of November 28,

(1) [1914] P. 116.

(2) Ibid. 120.

1932, would appear to fetter the discretion of the Court as to what costs the wife is entitled to be paid. By s. 51 of the Matrimonial Causes Act, 1857, a discretion is given to the Court to make such order as to costs as to the Court may seem just. That section is now replaced by s. 50 of the Judicature (Consolidation) Act, 1925, but the discretion of the Court remains the same; and it would be unfortunate if the order for extension of security made in the course of the trial were to be interpreted so as to limit the discretion of the Court by giving the wife an absolute right to security. All that the order does is to release her from any limit on the costs imposed by estimate before the trial. The Court is not fettered in any way, and her right in respect of any additional costs ordered thereafter to be paid to her will be a right which she can enforce in the ordinary course, but she is not to be treated as having a fund secured to her for the payment of that sum.

When the order is interpreted in that way, it will be seen that the wife has no sum allocated or appropriated to her costs over and above the sum already in Court, and, that being so, it cannot be said that there is any additional sum over which there can be a lien in favour of her solicitors. The case of *Mercer* v. *Graves* (1) seems to make that plain enough. The nature of a solicitor's lien is pointed out in the course of that case. It is merely a right to claim the equitable interference of the Court, who may order that the judgment obtained by the solicitor's client do stand as security for her costs and that payment of such an amount as will cover them be made to the solicitor in the first instance. That lien is one which prevails over a fund which is in sight; the right is one which, so to speak, cannot prevail at large. That being so, there does not appear to be any order which gives a right to the wife's solicitors to come to the Court and ask for the garnishee order. The order of March 10 gives them a right to receive the amount of her costs in right of the wife, but they are really the conduit pipe to receive the money and no more.

(1) L. R. 7 Q. B. 499.

As I pointed out in *In re a Debtor* (1), *Ex parte Muirhead* (2) is a case which illustrates the true position of such an order as that of March 10. It does not make the person who is to receive the money the dominus of the money; it merely indicates how and through what channel the money shall be received and paid. The reasoning of *Ex parte Muirhead* (2) seems plainly to indicate that the person who is the channel has not got any independent right which he can assert. In those circumstances, it would appear clear that there is no ground for saying that the solicitors who are with the wife appellants in this case can fulfil the conditions which are required in the first sentence of Order XLV., r. 1. More than that, it would also appear plain from *Hambleton* v. *Brown* (3) that an assignment can be made of the fruits of such an order as was made in favour of the intervener, Mrs. Trist. That was an absolute assignment, of which notice in writing was given, and in respect of that the husband would have a right of set-off against the sum ordered to be paid by him to the wife. It is suggested that there might still be some intervening right of the wife's solicitors. As I have pointed out, there does not appear to be a solicitor's lien. There was no charging order made under the Solicitors Act, 1932 (22 & 23 Geo. 5, c. 37), s. 69, replacing the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28, giving a lien to the solicitors, and the result is that there is a good set-off between those two sums. The learned President has said that if and so far as the question arose or became necessary to decide, he would exercise in his discretion the powers under Order LXV., r. 14, which provides that "A set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought."

For the reasons I have given it does not appear that there is a solicitor's lien, but we take note of the fact that the learned President, before whom the case was tried, was minded, if it was necessary, to exercise the powers given

(1) [1929] 2 Ch. 146, 152.
(2) (1876) 2 Ch. D. 22.
(3) [1917] 2 K. B. 93.

under that rule; and we should, if necessary, follow that indication of his opinion on that point also. For these reasons, in addition to those which are given by the President, the appeal is dismissed with costs.

LAWRENCE L.J. I agree and have nothing to add.

ROMER L.J. I agree. It has been frequently laid down, and by judges of great eminence, that where a wife is taking proceedings against her husband in the Divorce Court, or the husband is taking proceedings against her in that Court, the advice and assistance of solicitors is one of the necessaries that the wife is entitled to procure, pledging the credit of her husband for the purpose. From that two results ensue—results, however, that are perfectly distinct the one from the other, though I cannot say that in every case to which our attention has been called the distinction has been duly and carefully observed. The one result is that, as between the husband and wife as adverse litigants in the Divorce Court, the husband is ordered to pay to the wife her party and party costs—I need not pause to consider whether the whole or part of them—whether he succeeds in the proceedings or whether he fails. The second result is that the solicitor has a personal right to recover from the husband, in proceedings properly brought for the purpose, the balance of the wife's solicitor and client costs so far as they have not been otherwise recovered or paid to him. In the present case, on November 29, 1932, an order was made giving effect to the first of the two results that I have mentioned, and the husband was ordered to pay the wife's party and party costs. After those costs had been taxed an order was made on March 10, 1933, directing the husband to pay the wife's solicitors those costs, less the sum of 340*l.* that had already been paid into Court by way of security by the husband. That order, however, was made merely as a matter of procedure and not for the purposes of giving effect to the personal right of the solicitors against the husband, that right which, as I have said, forms the second of the two results that ensue from the principle laid down by the Courts. In my opinion, therefore, the wife's solicitors in this case were not persons who had, within the meaning of Order XLV., r. 1, obtained a judgment or order for the recovery or payment of money; it was the wife, and the wife only, who had obtained such a judgment or order. That being so, the solicitors had no right to obtain a garnishee order, and in my opinion the learned President was quite right, on those grounds alone, in discharging the order.

That being so, it is quite unnecessary to determine whether, as between the wife and the husband, the husband could set off, against the costs that he had been ordered to pay to the wife, a sum which he had procured to be assigned to him that was due from the wife to the intervener. Having heard arguments addressed to us upon that subject, I will only say that I am not at all convinced that such a right of set-off would be defeated either by the order made on November 28 or by anything that might be deemed to emerge material to the subject from Order LXV., r. 14. As regards the order made on November 28, I agree with what has been said by the Master of the Rolls as to its effect. It does appear that that is the effect which judges in the Divorce Court intend that such an order shall have. I will only add that I think it is a great pity that such an order should still be referred to as an order for "extended security" or "further security" or "additional security." It appears that it does not give to the wife any one of the three.

For these reasons I agree that this appeal fails.

Appeal dismissed.

Solicitors for the wife: *William White & Co.*

Solicitors for the husband: *Blundell, Baker & Co.*

H. C. G.

C. A.
1933
May 30.

CULLEN *v.* CULLEN (METHUEN, Co-respondent).

Divorce—Practice—Petition by Husband—Admission of Adultery in Petition—Particulars—Direction by Court that Statement of Particulars should be enclosed in Sealed Envelope and lodged in Court—Refusal of Access to Wife—Discretion of Court—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 178.

Where a petitioner for a divorce by his or her petition admits that he or she has been guilty of adultery and asks for the exercise of the discretion of the Court in his or her favour, the Court has, in the exercise of its power under the proviso to s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, a discretion to direct that the particulars of the adultery should be disclosed to the Court by a statement signed by the petitioner to be enclosed in a sealed envelope and lodged in Court, to be opened by the Registrar for the purpose of his certificate and resealed by him, but not to be disclosed to the other parties to the suit.

Appeal from a decision of Bateson J.

A petition for divorce was presented by the husband charging his wife with specific acts of adultery with a named co-respondent. In his petition the husband stated that he himself had been guilty of adultery, and asked the Court to exercise its discretion in his favour. The wife and co-respondent by their answers denied the adultery charged.

The wife applied to the Court for particulars of the adultery of the husband referred to in his petition.

Bateson J., in the exercise of his discretion under the proviso to s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, which re-enacted s. 31 of the Matrimonial Causes Act, 1857, ordered that the statement of particulars as to the husband's adultery should be signed by him, enclosed in a sealed envelope and lodged in Court, to be opened by the Registrar for the purpose of his certificate and resealed by him, and that the particulars should not be communicated to the wife.

The wife appealed. The appeal was heard on May 30, 1933.

Serjeant Sullivan K.C. and *Geoffrey Tyndale* for the wife.

W. N. Stable for the husband was not called upon.

LORD HANWORTH M.R. [after stating the facts:] The learned President in a recent case referred to in the Solicitors' Journal of December 24, 1932 (1), ordered that a petitioner's adultery should be disclosed to the Court by a signed statement of it being placed in a sealed envelope, and in the present case Bateson J., in the exercise of his discretion, adopted a similar course, and ordered that the sealed envelope should be lodged in Court to be opened by the Registrar for the purpose of his certificate and resealed by him. It is contended, however, that this statement ought to be revealed to the other parties to the suit and ought not to be placed in a sealed envelope.

In the case referred to in the Solicitors' Journal, the President acceded to the petitioner's request that his adultery might be disclosed to the Court in that way. It was not suggested that what was done in that case was to form a precedent in future cases, and in fact the President there stated that in doing what he did he was dealing only with the case which was before him, and that was equally so in the present case when Bateson J. made the order complained of. There is no hard and fast rule for all cases; each case is one for the discretion of the Court. That being so, any order made by a judge ought not lightly to be interfered with by this Court.

It is contended, however, that it is not a matter of pure discretion, as it vitally affects the rights of the other spouse, and is consequently not a matter which ought to be withheld from the knowledge of the other spouse.

The origin of the Divorce Court is derived from the Matrimonial Causes Act, 1857. There were in that Act sections which dealt with the discretion vested in the Court. Sect. 29 imposed on the Court a duty to satisfy itself, so far as it reasonably could, not only as to facts alleged, but also whether or no the petitioner had been in any way accessory to or conniving at the adultery, or had condoned it, and also to inquire into any counter charge which might be made against the petitioner. By s. 30 the Court, if not satisfied, "shall dismiss the said petition." By s. 31, if the Court was satisfied, it was to pronounce a divorce declaring the marriage to be dissolved. Then came the important proviso: "Provided always, that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery. . . . ." That proviso indicated that the Court was to have discretion to relieve the petitioner from the consequences of his or her adultery.

---

(1) 76 Sol. Journ. 893.

The matter was discussed in *Coleman* v. *Coleman* (1) and in *Morgan* v. *Morgan.* (2) In the first case the Court, on the wife's petition, exercised its discretion under s. 31 and dissolved the marriage, notwithstanding that the wife had committed adultery, on the ground that the husband had been guilty of adultery and cruelty and had also by threats of personal violence coerced the petitioner into leading a life of prostitution, and had lived on the money so obtained by her. Lord Penzance in giving judgment said (3): "But the language of the section obviously imports that the Court must be guided, in granting or withholding a decree, by the circumstances of the case, and that it has a discretion to exercise in the matter."

In *Morgan* v. *Morgan* (4) Lord Penzance in the course of the argument said: "The Court has only, up to the present time, recognised three classes of cases in which it would exercise the discretion given to it under the 31st section of the Divorce Act, 1857. There is first a class of cases . . . . in which the petitioner having instituted a suit against his wife for adultery, was led to believe she was dead, and acting on that belief married again. Again, there was the case *Coleman* v. *Coleman* (1), in which the petitioner satisfied the Court that she had been compelled by her husband to lead a life of prostitution. Lastly, there are cases . . . . in which an act of adultery of the husband has been condoned by the wife, and in no way conduces to her subsequent falling away. If we desert these principles, and in each instance consider whether the act of adultery proved against the petitioner is more or less pardonable, we shall get into great difficulties." In that particular case the judge declined to exercise a discretion in favour of the petitioner but said (1): "I hold, therefore, that the discretion to be exercised under the 31st section of the statute should be a regulated discretion, and not a free option subordinated to no rules. It was probably reposed in the Court because the legislature found it impossible to foresee and specify the classes of cases fit for its application which might arise under the new law. The duty of reducing its exercise to method devolves upon the Court." The exercise of the discretion there was asked for when the issues on the petition had already been decided and the papers had been sent to the King's Proctor.

---

(1) (1866) L. R. 1 P. & M. 81.
(2) (1869) L. R. 1 P. & M. 644.
(3) L. R. 1 P. & M. 81, 83.
(4) L. R. 1 P. & M. 644, 645.

In *Tickner* v. *Tickner* (2) at the close of the evidence the Court was asked to grant a decree nisi. Sir Henry Duke P. referred to the discretion given to the Court, to *Morgan* v. *Morgan* (3) and *Constantinidi* v. *Constantinidi and Lance* (4), and recalled (5) what was said by Vaughan Williams L.J. in the latter case, that "the Court must have regard not only to the rights and liabilities of the matrimonial person wronged and of the wrongdoer respectively inter se, but also to the interests of society and public morality." He also quoted (6) what Stirling L.J. said, that in the exercise of every discretion which is vested in the Court "the Court should endeavour to promote virtue and morality and to discourage vice and immorality." The learned judge summed up as follows (6): "What I have really to determine is whether on grounds of public policy and by way of an example she ought to be left under a disability to contract a new marriage until she is set free by the death of the respondent."

All those cases illustrate the importance of the discretion under s. 31 of the Act of 1857, now s. 178 of the Supreme

(1) L. R. 1 P. & M. 647.

(2) [1924] P. 118; 40 Times L. R. 367.

(3) L. R. 1 P. & M. 644.

(4) [1903] P. 246.

(5) 40 Times L. R. 367, 369.

(6) Ibid 370.

Court of Judicature (Consolidation) Act, 1925, which provides that: "(1.) On a petition for divorce it shall be the duty of the Court to satisfy itself so far as it reasonably can both as to the facts alleged and also as to whether the petitioner has been accessory to or has connived at or condoned the adultery or not. . . . . Provided that the Court shall not be bound to pronounce a decree of divorce if it finds that the petitioner has during the marriage been guilty of adultery. . . . ."

It is important to remember s. 198 of the Act of 1925, which was formerly s. 43 of the Act of 1857. Sect. 43 provided: "The Court may, if it shall think fit, order the attendance of the petitioner, and may examine him or her, or permit him or her to be examined or cross-examined on oath on the hearing of the petition; but no such petitioner shall be bound to answer any question tending to show that he or she has been guilty of adultery." Sect. 198 of the Act of 1925 is to the same effect. It provides: "The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery." Bearing those sections in mind, it is clear that there is a discretion vested in the Court, and the petitioner must show that he has fulfilled the conditions of s. 178 and reveal to the Court any adultery committed by him during the marriage.

Now under the present practice a statement of that adultery must be made in the petition. There is no indication that it was intended by the practice or by the sections that this statement revealing the petitioner's adultery was to enure in favour of the other spouse. It is plain, therefore, that there is a discretion given to the Court as to how it will exercise the powers given it under the

C. A.
1933

CULLEN
v.
CULLEN.

Lord Hanworth M.R.

proviso to s. 178. The Court should be able, in proper cases, to be unfettered by any rule, and to say that particulars of the petitioner's adultery should be sealed up in an envelope. There is no ground for saying that that would be outside the discretionary powers of the Court. We therefore treat this entirely as a matter for the discretion of the Court and the appeal must be dismissed with costs.

LAWRENCE L.J. I agree. Whether or not particulars of the adultery of the petitioner should be ordered to be placed in a sealed envelope is a matter purely for the discretion of the Court, and it would be wrong for this Court to lay down any rules governing its exercise or fettering it in any way. Here the appellant has not shown that the learned judge has failed to exercise his discretion, still less that he has exercised it wrongly. The appeal must therefore be dismissed.

ROMER L.J. I agree and have nothing to add.

Appeal dismissed.

Solicitor for appellant: *Samuel Coleman.*
Solicitors for respondent: *Theodore Goddard & Co.*

W. I. C.

1933
June 27, 30.

THE MINERVA.

Shipping—Damage to a Grain Elevator Barge—Steamship's defective Derrick—Jurisdiction in rem—Judicature (*Consolidation*) *Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 22, *sub-s.* 1 (*a*), (*iii.*), (*iv.*).

The plaintiffs' grain elevator barge was damaged by a portion of the elevator falling on to the deck owing to the breaking of a wire on the derrick of the defendants' steamship from which the barge had been discharging cargo.

By s. 22, sub-s. 1 (*a*), of the Judicature (Consolidation) Act, 1925, the High Court in relation to Admiralty matters has jurisdiction to determine "(iii.) any claim for damage received by a ship . . . ." and by sub-s. 1 (*a*) (iv.) to determine "any claim for damage done by a ship."

By s. 33, sub-s. 2, the jurisdiction may be exercised either in proceedings in rem or in personam.

The Liverpool district registrar set aside the writ in rem issued by the plaintiffs against the owners of the steamship, a foreign vessel, on the ground of want of jurisdiction.

The plaintiffs appealed :—

Held, (1.) that as the plaintiffs' barge had received damage and a part of the defendants' ship had caused the injury, the action was rightly brought in rem under sub-s. (iii.); (2.) that the action could also be framed in rem under sub-s. (iv.) as "damage done by a ship"; and that on both grounds the appeal must be allowed.

Appeal Summons adjourned into Court for argument.

The plaintiffs, the owners of the grain elevator barge *New Perseverance*, appealed from an order of the Liverpool district registrar setting aside a writ in rem on the ground of want of jurisdiction.

On January 10, 1933, the elevator barge had completed the discharge of a cargo of grain from the holds of the Norwegian steamship *Minerva*, owned by the defendants. The *Minerva* was lying at Seacombe Warehouses, Birkenhead. The elevator itself was then dismantled in order to stow it on the *New Perseverance*, and, while one half of the elevator was being hoisted by the *Minerva's* derrick, the wire span broke and the half elevator fell on to the deck of the *New Perseverance*, damaging both the elevator and the barge.

By s. 22, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925 : "The High Court shall, in relation to Admiralty matters, have the following jurisdiction . . . . that is to say—(*a*) jurisdiction to hear and determine any of the following questions or claims :—

(iii.) Any claim for damage received by a ship, whether received within the body of a county or on the high seas ;

(iv.) Any claim for damage done by a ship."

Sect. 33, sub-s. 2, provides that : "The Admiralty jurisdiction of the High Court may be exercised either in proceedings in rem or in proceedings in personam."

Eustace W. Brightman for the plaintiffs. The injury to the *New Perseverance* clearly was "damage received by a ship" ; it also was "damage done by a ship." It appears to be suggested by the defendants that under sub-ss. (iii.) and (iv.) proceedings can only be brought in rem in respect of damage arising in some way from an act of navigation, but the language of the sub-sections is quite general and, even if such an interpretation were right, the damage did in fact arise out of an act of navigation, for the *Minerva* was lying alongside a dock to which she had been navigated for the purposes of discharge. Navigation includes many things quite unconnected with the actual movement of a vessel : the negligent act can be that of a person on shore but it is nevertheless "damage done by a ship" : see *The Warkworth* (1) (damage due to faulty steering-gear) ; *The Clara Killam* (2) (damage to a telegraph cable) ; *Good* v. *London Steamship Owners' Association* (3) (negligent opening of a seacock). The damage can be done by part of a ship, e.g., by an anchor (*In re Margetts and Ocean Accident and Guarantee Corporation* (4)), and necessary appurtenances, such as a derrick, are in the same category. The ratio decidendi in *The Chr. Knudsen* (5) is equally applicable to the present case.

[Reference was also made to *Hayn* v. *Culliford*. (6)]

Willmer for the defendants. This was not "damage done by a ship" within the meaning of sub-s. (iv.). In *The*

---

(1) (1884) 9 P. D. 145.

(2) (1870) L. R. 3 A. & E. 161.

(3) (1871) L. R. 6 C. P. 563.

(4) [1901] 2 K. B. 792.

(5) [1932] P. 153.

(6) (1878) 3 C. P. D. 410, 417.

Theta (1), where a man fell down the hold of a ship, it was held that it was not " damage done by a ship," and in *The Vera Cruz* (*No.* 2) (2) Bowen L.J. said: "'done by a ship' means done by those in charge of a ship, with the ship as the noxious instrument," and the Earl of Selborne in the same case referred to " maritime damage by ships." Similarly in *Currie* v. *M'Knight* (3) Lord Halsbury said that the ship over which a maritime lien for damage is claimed—and there would be a maritime lien in the present case if the plaintiffs are right—must be " the instrument of mischief " and " some act of navigation of the ship itself should either mediately or immediately be the cause of the damage."

[BATESON J. The question there was whether there was a maritime lien, and the Courts at that time leant strongly against any extension of that right.]

A very similar case to the present one was decided in Ireland, when it was held that personal injuries to a stevedore through the breaking of a derrick was not " damage done by a ship " within the meaning of s. 29 of the Court of Admiralty (Ir.) Act, 1867: *M'Evoy* v. *The Sneyd.* (4) That case is conclusive of the present one so far as sub-s. (iv.) is concerned.

It is not disputed that the injury was " damage received by a ship," and that there would be jurisdiction in personam, but to found an action in rem there must be a wrong-doing res, i.e., a wrong done by those in charge of the res. Here the damage was not done by those in charge of the *Minerva*, and, on the plaintiffs' own affidavit, the claim is not in respect of negligent navigation. Proceedings in rem are only applicable where maritime property is concerned, a lorry on the quayside could not be arrested under Admiralty proceedings in rem for damage done by it to a ship alongside the quay. Further, a vessel in the position of the *Minerva* at the material time is merely a temporary warehouse for the grain being discharged from her holds. On all these grounds the district registrar was right in holding that there was no jurisdiction in rem under either sub-section.

(1) [1894] P. 280.

(2) (1884) 9 P. D. 96, 101; 10 App. Cas. 59, 66.

(3) [1897] A. C. 97, 101.

(4) (1895 29 Ir. Law Times 317.

Brightman in reply. The facts are not stated in the report of *M'Evoy* v. *The Sneyd* (1), nor is it even stated what Court gave the decision, which cannot bind this Court in any event. In *The Theta* (2) no work was being done on the ship at all, and the actual cause of the damage was the plaintiff falling down the hold; and in *Currie* v. *M'Knight* (3) no damage was done by the ship, the person causing the damage merely happened to be her master.

[Reference was also made to *The Industrie.* (4)]

Cur. adv. vult.

June 30. BATESON J. I think this appeal succeeds. It is an appeal from the district registrar of Liverpool, who set aside the writ in the action on the ground, as I understand, that there was no jurisdiction to arrest a foreign ship in the circumstances of the case.

For the purposes of this appeal I assume the allegations contained in the indorsement of the writ and in the plaintiffs' affidavit to be true. The indorsement of the writ is: " The plaintiffs' claim is for damages for injury sustained at Birkenhead during the month of January, 1933, by their grain elevator *New Perseverance*, by reason of the negligence of the defendants or their servants in the navigation and management of the defendants' steamship *Minerva* and/or owing to the negligence or breach of duty of those in control of her."

The affidavit of the man in charge of the *New Perseverance* says that: " At about 4 P.M. on January 10, 1933, the *New Perseverance* completed the discharge of a cargo of grain from the after hold of the above named steamship *Minerva* which was lying at East Tower, Seacombe Warehouses, Birkenhead. The elevator was thereupon taken down in order that it could be stowed on the *New Perseverance*. In the course of this operation one half of the elevator remained on board the *Minerva*, whilst those on board the *Minerva* made the necessary preparations to enable them to transfer the half elevator to the *New Perseverance* by means of the wires and derricks belonging to the *Minerva*. When those on board the *Minerva* had got everything ready, the half of the elevator which had remained on board the *Minerva* was hoisted from the *Minerva* by her derrick, but before it had been safely placed on board the *New Perseverance* the wire broke and the half elevator fell on to the deck of the *New Perseverance* doing damage to the *New Perseverance* and to the half elevator." Then he says : " The wire which broke was an ordinary 2¼ in. wire such as most vessels carry and formed part of the equipment necessary for working the derrick." In addition it was agreed that I was also to assume that the wire which broke on the *Minerva* was the span. That is, as I understand it, the wire which connects the derrick to the mast and holds it up. If the span breaks the derrick and its burden fall in a heap.

---

(1) 29 Ir. Law Times 317.

(2) [1894] P. 280.

(3) [1897] A. C. 97.

(4) (1871) L. R. 3 A. & E. 303.

On this material it is clear that the plaintiffs' case is that the *New Perseverance* received damage to her deck and her elevator by the negligence of the defendants' servants in handling and using the gear of their ship *Minerva*. It also seems clear that the damage to the *New Perseverance* was done by the faulty gear of the *Minerva*, that is, by a part of the *Minerva* herself. The dropping of the elevator by the gear, and the dropping of the elevator and the gear together, did damage to the *New Perseverance*, her deck and her elevator.

The Judicature (Consolidation) Act of 1925, s. 22, sub-s. 1 (*a*) (iii.) and (iv.), and s. 33, sub-s. 2, are the sections in point. [His Lordship read the sections and continued :] In my view, the words of the statute in sub-s. (iii.), "damage received by a ship," are clear, and are " as wide as could well be conceived," as Lord Herschell said in *The Zeta*. (1) This is undoubtedly damage received by a ship. The plaintiffs allege it was received owing to the negligence of the defendants' servants in and about the navigation and management of the defendants' ship. The plaintiffs, under s. 33, sub-s. 2, may proceed in rem or in personam.

(1) [1893] A. C. 468, 477.

This writ is against the res by, from, and on which the cause of the injury to the plaintiffs' vessel arose. The res is here and can be arrested, and it seems to me that it is within the four corners of the Act. There is no limitation on the words, and decisions on other words, or other sub-sections, or clauses, do not seem to me to help.

Further, I think the claim can be put under sub-s. 4, as damage done by a ship. I think the damage here may be said to be done by the derrick and its load falling on the *New Perseverance*. That is damage done by the defendants' ship. If part of the ship does the damage I think that is enough—e.g., if it were done by an anchor or by a propeller. It is common enough in this Division in its Admiralty Jurisdiction—and, indeed, in the old Admiralty Court—for such cases to be tried and for a vessel to be arrested. I quite agree with Mr. Willmer in saying that "done by the ship" connotes the ship as the active cause of damage, if he means the ship or part of it. It will not do, I think, to say that sub-s. 3 only applies if the damage is done by a ship, otherwise there would be no need of sub-s. 3 at all.

I think the reason why the old Admiralty Court Act of 1840, confined as it was to damage received, and amended by the Act of 1861 to include damage done, was passed was because it was thought right to preserve all the old jurisdiction, and extend it to cases within the body of a county which would have been within the jurisdiction if occurring on the high seas. If on the high seas a mast or a jibboom had fallen on another ship no question could have arisen as to the jurisdiction in rem and the right to arrest the ship. Nowadays, such an accident might easily happen in refuelling a ship at sea. In this case there was damage received by parts of one ship through the failure of a part of another ship to act properly in the hands of the defendants' servants.

Several cases and dicta were cited. In *The Clara Killam* (1), in 1870, the claim was by the owners of a telegraph cable against a ship whose mate had cut the cable. That was held to be damage done by a ship. It seems to me that if

(1) L. R. 3 A. & E. 161.

1933

THE MINERVA.

Bateson J.

there was jurisdiction in such a case and the ship could be arrested—as she was—this is a much stronger case. In *The Industrie* (1) the claim was for injury received by a ship forced ashore by another vessel under way. Under the words "damage received by a ship" it was held that there was jurisdiction and the ship was arrested. I think that is the one case among those cited where the words "damage received by a ship" arose. In the same year, 1871, in *Good* v. *London Steamship Owners' Association* (2), which was a case where a seacock was left open so that the cargo became damaged, Willes J. held that "improper navigation" covered something improperly done by a ship or a part of a ship in the course of the voyage. It is a decision which seems rather far away from the matter that I have to consider, but it does show that in considering what is a ship in such circumstances, part of a ship is, of course, all that is necessary.

In 1884 *The Warkworth* (3) was decided. That was a case where the steering machinery went wrong for want of a pin, and the collision, due to the vessel failing to steer properly, was held to be improper navigation under the limitation section of the Merchant Shipping Act. That, again, does not seem to be very much in point, because it is not on the sections in question. In the same year *The Vera Cruz* (4) was decided. That was an action under Lord Campbell's Act, and it was held that an action under that Act does not come within the Admiralty Court Act of 1861, where the words are the same as in the present Act—namely, "damage done by a ship." There was no actual injury to the person who was claiming and on whose account the action was brought, and Bowen L.J. said injury to the family cannot be said to be "done by the ship." He also said "done by a ship" means "done by those in charge of a ship, with the ship as the noxious instrument." Brett M.R. spoke of the ship as being "the active cause." The House of Lords also had that case before them and the decision of the Court of Appeal was affirmed. In 1894 *The Theta* (5) was decided. That was the

(1) L. R. 3 A. & E. 303.

(2) L. R. C. P. 563.

(3) 9 P. D. 145.

(4) 9 P. D. 96, 101.

(5) [1894] P. 280.

case of a man falling down the hold of a ship, and it was held that that was not "damage done by a ship." That seems to be obvious.

In 1895 *M'Evoy* v. *The Sneyd* (1) was decided. That is in a note in the Irish Law Times, and whether it is to be regarded as a newspaper report or a law report I am not quite sure. It says "personal injury to a stevedore by derrick breaking." It was held that the ship was not the active cause. In the old days such a report would certainly not have been listened to by Brett L.J., but there it is. There are no arguments reported; there are no reasons given; I do not know who decided the case; and, at any rate, it is only a decision on the words "damage done by a ship." I should imagine—but, of course, it does not appear—it could hardly have been on the words "damage received by a ship." It is a decision under the Irish Act which, I am told, contains the phrase "damage received or done by." But it does not touch the argument as regards "damage received by a ship." Of course, if the case had been reported so that one could see what the facts and reasons were, and what the argument was, I should have paid considerable attention to it, but, under any circumstances, I do not think it would bind me, and it is not, to my mind, in any way conclusive of this case.

In 1896 *Currie* v. *M'Knight* (2), also known as *The Dunlossit*, was decided. That was a case where some of the crew of the ship cut the cables of another ship in order that they might get away to sea, and the question there was whether there was a maritime lien or not. There was no question of jurisdiction or of remedy in rem except, I think, that the argument was that the remedy in rem was enough for a maritime lien. Damage done by a ship in navigation is what seems to have been considered, but the real question was whether *The Bold Buccleugh* (3)—under which the maritime lien for damage done by a collision was held to exist—applied to such a case or not, and it was held that it did not. In

(1) 29 Ir. Law Times, 317.

(2) [1897] A. C. 97.

(3) (1851) 7 Moo. P. C. 267.

1901, in *In re Margetts and Ocean Accident and Guarantee Corporation* (1), it was held that a collision with a ship's anchor to which another vessel was riding was a collision with the "vessel" within the meaning of a policy of marine insurance. It does not seem to assist very much in construing the clauses in this case, but it does show that the anchor to which a vessel was riding was considered to be a part of the vessel.

The most recent case cited was *The Chr. Knudsen* (2), where I was faced with an obiter dicta of my own—which, of course, I can disregard. The substance of that case was that I held that the sinking of a barge in dock by a ship was damage done by the ship to the dock owner who had to clear it away. Those are all the cases which were cited before me, with the exception of *Hayn* v. *Culliford* (3), to which Mr. Brightman referred, and which I do not think it is necessary to discuss.

Practically all those cases except the one I have mentioned turn on the words "damage done by a ship." Even if I am wrong in my view that this is, or may be, a claim for "damage done by a ship" to the elevator and deck of a ship, it leaves the claim for "damage received by a ship" still good, and nothing that I can see prevents me holding that the jurisdiction which can be exercised in rem is properly exercised by arresting the *Minerva*. Mr. Willmer's argument seems to involve adding words to the statute which are not there. He says you cannot have damage "received by a ship" unless it is done by a ship, with the ship as the active cause. The section does not say so. The plaintiffs, he contends, must show that the ship caused the damage, but I cannot find that in this particular sub-section, or anywhere else. He also says that the remedy in rem and the maritime lien are the same thing—at least, that is what I understand. That idea has been exploded I think since *The Heinrich Björn* (4), the necessaries case; the towage case (*Westrup* v. *Great Yarmouth Steam Carrying*

---

(1) [1901] 2 K. B. 792.

(2) [1932] P. 153.

(3) 3 C. P. D. 410.

(4) (1886) 11 App. Cas. 270.

Co. (1)); and the master's disbursements case (*The Sara* (2)) —though the latter is a case which has since been remedied by statute. These last three cases I have mentioned were argued largely on the basis that maritime lien and remedy in rem were convertible terms—an argument which completely failed. There are many cases where there is a remedy in rem and there is no maritime lien where the jurisdiction of this Division on the Admiralty side is exercised by arresting the ship. Mr. Brightman pointed out that the *Minerva* was in fact being navigated, as she was completing her discharge in the course of the navigation to deliver her cargo, and that the cases show that there is no need of movement of the ship to entitle him to sue.

The order appealed from must be set aside. Leave to appeal.

Solicitors for the plaintiffs: *Weightman, Pedder & Co., Liverpool.*

Solicitors for the defendants: *Hill, Dickinson & Co., Liverpool.*

(1) (1889) 43 Ch. D. 241.

(2) (1889) 14 App. Cas. 209.

E. C. M. T.

C. A.

1933

June 19, 20, 21; *July* 3.

THE KAITUNA.

Shipping—Collision—Vessels "nearly end on"—Alterations in Heading due to Yawing—Crossing Rule—Regulations for Preventing Collisions at Sea, 1910, *arts.* 18, 19.

By art. 18 of the Regulations for Preventing Collisions at Sea, 1910, "where two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other." "The only cases to which (this Article) does apply are . . . . by night to cases in which each ship is in such a position as to see both the sidelights of the other."

By art. 19, "when two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

Two steam vessels, the *S.* and the *K.*, while on courses crossing one another at the fine angle of 8 degrees, sighted each other's lights at a distance of several miles. The *S.* first sighted the masthead light of the *K.* fine on the starboard bow, and afterwards, as the *K.* was yawing considerably, saw both her sidelights. The *K.* had the masthead and green lights of the *S.* open to her a little on the port bow, and the Elder Brethren were of opinion that there must have been times also when (although those on board the *K.* denied seeing it) the red light of the *S.* must also have been open. The *S.* crossed on to the starboard bow of the *K.*, and having got into a position of green light to green light altered her course to starboard, rendering a collision imminent. The *K.*, which up to that time had kept her course and speed, then went full speed astern and hard-a-ported her helm (old command).

Langton J. held that art. 18 applied, and that while the *S.* was to blame for porting and hard-a-porting when the vessels were green to green and for not sounding any whistle signals, the *K.* was also to blame for not at an earlier stage altering her course to starboard so as to pass port to port, and he accordingly held the *S.* three-fourths to blame and the *K.* one-fourth. Both parties appealed.

On appeal the assessors advised the Court that while, owing to the yawing of the *K.*, the *S.* would "constantly" see both sidelights of the *K.*, the *K.*, although she might possibly (but not necessarily) see both sidelights of the *S.* "occasionally," would generally be seeing the green light only:—

Held, that, as the substantially prevailing position was not that each vessel was generally seeing both sidelights of the other, the requirements of art. 18 were not complied with; that accordingly the vessels came under art. 19, and that the *S.* was alone to blame.

Judgment of Langton J. reversed.

Appeal and Cross-appeal from a judgment of Langton J. in an action of damage by collision.

The plaintiffs were the owners of the Norwegian steamship *Selje;* the defendants were the owners of the British steamship *Kaituna.* The collision occurred off the south coast of Australia on the night of March 29, 1929. Shortly stated, the facts as found by the learned judge were as follows :—

The *Selje* was proceeding on a course of N. 86° W. mag. The *Kaituna*, a smaller vessel, was on a course of S. 78° E. mag., a course which crossed that of the *Selje* at an angle of 8 degrees. The vessels sighted each other's lights at a distance of several miles; the masthead light of the *Kaituna* being seen by those on the *Selje* fine on the starboard bow and the two masthead lights of the *Selje* a little on the *Kaituna's* port bow. As regards the sidelights, in the view of the Elder Brethren "there must have been considerable yawing on the part of the *Kaituna*, and probably on the part of both vessels, and, therefore, there must have been times at which, if a continuously competent and vigilant look-out had been kept, the two sidelights of each vessel must have been, at times, open to the other vessel." The *Selje* did continually see both sidelights of the *Kaituna*, but those on the *Kaituna* said that until the *Selje* ported, as detailed in the next paragraph, they only saw the *Selje's* green light.

When still a considerable distance away the *Selje* crossed the course of the *Kaituna* and got on to her starboard bow, and then when green to green ported and hard-a-ported (old command) without sounding any whistle signals. The *Kaituna*, which up to that time had kept her course in the belief that the crossing rule (art. 19) applied, at once went full speed astern, hard-a-ported her helm and sounded one short blast on her whistle; but the vessels came into collision at nearly a right angle, the stem of the *Kaituna* striking the port side aft of the *Selje*, doing the *Selje* so much damage that she shortly afterwards sank.

Langton J. said that he had consulted the Elder Brethren, and in their view it was quite clearly a case of "nearly end on," which seamen would treat as coming under art. 18. That advice commended itself to him and admittedly, if it was an end on case and the *Kaituna* did not port, to that extent she must be to blame. It was alleged against her that she must have starboarded, but his Lordship "emphatically rejected" that suggestion. As regards the *Selje*, the man in charge of her at least judged the situation at the first onset correctly, because he saw the two sidelights of the *Kaituna* and arrived at the view that it was a case under art. 18. But as soon as he appreciated that, his duty was to alter his course to starboard. If he had taken any effective action at any early period under port helm, seeing that the vessels were crossing at such a narrow angle, he must have gone clear. Instead of going clear he crossed the bows of the *Kaituna*, got slightly on to her starboard bow into a position of comparative safety—although, in his Lordship's opinion, all danger of collision had not passed away—and then "committed the most unforgivable of sins in the nautical world," ported and hard-a-ported to a green light without even advertising to the *Kaituna* by means of his whistle what he was doing. It might seem hard under those circumstances to blame the *Kaituna*, but if she also had acted promptly under art. 18 the collision could have been avoided. At a later stage, however, the *Selje* was very much more to blame, and he apportioned the blame accordingly as three-fourths on the *Selje* and one-fourth on the *Kaituna*. The defendants appealed and the plaintiffs cross-appealed.

W. Norman Raeburn K.C. and *G. St. C. Pilcher* for the appellants (defendants). The learned judge was wrong in holding that the end on rule (art. 18) applied. For that rule to apply each vessel must see—and see continuously—both sidelights of the other, a momentary glimpse due to yawing is not enough and, as regards yawing, the yawing of the *Kaituna* would not open to those on board her both sidelights of the *Selje*, it would merely open both the *Kaituna's* sidelights to the *Selje*. The *Kaituna* cannot be convicted of a bad look-out unless it is shown that both the sidelights of the *Selje* must have been open to her. Her evidence is that she was only seeing the *Selje's* green light, and obviously she could not port to a green light on her port bow. The vessels came under the crossing rule (art. 19), and the *Selje* was alone to blame for crossing ahead of the *Kaituna*, and then, having got into a position of safety green to green, hard-a-porting into the *Kaituna*. The vessels had then definitely passed out of the phase of either crossing or end on ships: see Lord Finlay's observations in *The Orduna*. (1) On the bearings, when the vessels first sighted each other there was no risk of collision, they would have passed clear on their respective courses, and no measures under either article were necessary: see, as to meeting "with risk of collision," *The Beryl* (2) and the American case of *The Nichols*. (3) In *The Constitution* (4) the vessels were upon courses within about 1½ points of being directly opposite, and in *The Ava* (5) within about 1 point, and in both cases were held to be not end on: cf. *The Earl of Elgin* and *The Jesmond*. (6)

[Reference was also made to *The Cleopatra* (7); *Crown Steamship Co.* v. *Eastern Navigation Co.* (8); *The Otranto* (9); and Marsden's Collisions at Sea, 8th ed., pp. 300, 372, 376.]

E. Aylmer Digby K.C. and *B. B. Stenham* for the respondents (plaintiffs and cross appellants). On the authorities about a point on either bow seems to be the dividing line between an end on and a crossing case, and, under all the circumstances, this was an end on case within the meaning of art. 18. The vessels were crossing at a very fine angle; the *Kaituna* was in a position, if she had had a better look-out, occasionally to see both sidelights of the *Selje*, and the *Selje* was continuously seeing both sidelights of the *Kaituna*. If it was not an end on case the *Selje* would only have seen both lights very momentarily as the *Kaituna* yawed. The vessels would not have gone clear on their original bearing, which was finer than those on the *Kaituna* alleged. The *Selje* correctly appreciated that it was an end on case, and the learned judge was wrong in rejecting her

(1) [1921] 1 A. C. 250, 265.
(2) (1884) 9 P. D. 137.
(3) (1868) 7 Wall. 656.
(4) (1864) 2 Moo. P. C. (N. S.) 453.
(5) (1873) 2 Asp. M. L. C. 182.
(6) (1871) 1 Asp. M. L. C. 150.
(7) (1856) Swa. 135.
(8) 1918 S. C. 303.
(9) [1931] A. C. 194.

story that she took sufficiently early action by porting and that the *Kaituna* defeated the *Selje's* manœuvres by starboarding. Unless the *Kaituna* starboarded the vessels could not have come into collision at the wide angle at which it is admitted that it took place, and she should be held to blame in a greater degree than the *Selje*.

Raeburn K.C. replied.

Cur. adv. vult.

July 3. The following judgments were read :—

Scrutton L.J. This appeal concerns a collision at night off Cape Otway on the south coast of Australia between the Norwegian steamship *Selje* and the British steamship *Kaituna*. The *Selje* was the larger of the two : 6598 tons gross and 420 feet long : the *Kaituna* being 2042 tons gross and 280 feet long. The *Selje* was laden with a draught of 28 feet 3 inches forward and 28 feet 6 inches aft ; the *Kaituna* was light, 6 feet 3 inches forward and 13 feet 9 inches aft. The *Selje* had masthead lights on two masts, the *Kaituna* on only one mast. The courses were crossing at an angle of 8 degrees, the *Selje* N. 86° W. ; the *Kaituna* S. 78° E., both magnetic. Under these circumstances the two vessels came into collision at right angles, a result which indicates something very wrong somewhere. Each says she saw the other eight to ten miles away. The judge has found that art. 18 applied, the ships being "nearly end on" within the meaning of that rule ; that the *Kaituna* was to blame for not porting, so as to comply with art. 18 by passing the other vessel port to port ; and that the *Selje* was to blame for altering her helm without giving a whistle signal, and for porting to a green light. He puts the principal blame on the *Selje*, who admits helm action without a whistle signal, and finds the *Selje* three-fourths to blame and the *Kaituna* one-fourth. Each ship appeals.

The case depends in the first instance on whether the end on rule (art. 18) or the crossing rule (art. 19) applies. There was 8 degrees difference in courses, but the *Kaituna* was very light forward and there was a south-westerly swell and wind on her starboard bow. Under these circumstances there was probably yawing, which might alter her heading from time to time, and affect the visibility of one or other of her sidelights to the approaching ship. The judge below has taken what I think is the rather unusual course of asking the Trinity masters in effect whether art. 18 or art. 19 applied. "In these circumstances would a competent seaman act and treat the matter as within the end on rule or the crossing rule?" They answered: "It is undoubtedly and quite clearly a case of nearly end on," i.e., art. 18. They gave their reason: "But different considerations apply when you have to take into consideration an ocean swell, night, and the fact that one vessel—except for 105 tons in her stern—is practically flying light and has, as her draught, 6 feet forward and some 13 feet aft." In their view "there must have been considerable yawing on the part of that vessel [the *Kaituna*], and probably on the part of both vessels, and, therefore, there must have been times at which, if a continuously competent and vigilant look-out had been kept, the two lights of each vessel must have been, at times, open to the other vessel." It will be observed that they say "at times."

Now the addition which was made to art. 18 attempts to define when vessels are meeting "nearly end on," in itself a vague and not very helpful description, by prescribing as "the only case to which it [the rule] applies," the case where at night "each ship is in such a position as to see both the sidelights of the other." It will be noted "*each* ship," not one ship only. As a matter of construction it appears to me that it will not be sufficient, to make art. 18 apply, that one vessel may, though generally seeing one sidelight only, very occasionally see two sidelights. Difficult questions may arise while the conditions of one sidelight only, or two sidelights, are visible, each existing for a substantial time. There may be an ambiguous and varying condition in which the other ship, seeing repeated changes of visibility, may be well advised to take off her speed and wait till she can clearly understand what the changes mean. But if one condition substantially prevails, and there is only a brief

C. A.
1933

THE KAITUNA.

Scrutton L.J.

interval of the other condition, in my opinion the requirement that each vessel shall be in such a position as to see both the sidelights of the other is not complied with. Now the probable extent of yawing, if any, of a vessel very light forward, with swell and wind on her starboard bow, is a matter of nautical experience for which the Court must rely on its assessors, and we have asked our assessors, not the construction of the rules, which is not in my opinion for them, but the probable results of given data. We asked them the following questions: Would the result of the pleaded courses, speeds, draughts, S.W. swell and wind, with one of the ships very light forward, be: (*a*) "That each ship would see both sidelights of the other constantly?" Ans.: "No"; (*b*): "Or for a substantial time though not constantly?": Ans.: "*Kaituna* might possibly see both *Selje's* lights occasionally, but not necessarily, and *Selje* would see both *Kaituna's* lights more frequently"; (*c*) "Or"—the question goes on—"would each ship generally be only seeing one sidelight of the other?": Ans.: "The *Kaituna* would be generally seeing the *Selje's* green light. The *Selje* would almost constantly see both *Kaituna's* sidelights." The last question was: (*d*) "Would one ship only be in that position, seeing one sidelight, if so, which ship?": Ans.: "*Kaituna*."

It will be seen that the assessors reply that each vessel would not constantly see the two sidelights of the other; that the *Selje* would see both lights of the *Kaituna* "almost constantly" or "more frequently," but that the *Kaituna*, though she might possibly see both *Selje's* lights occasionally but not necessarily, would generally be seeing the *Selje's* green light only. I should myself come to the same conclusion. It follows in my opinion that this was not a case in which each vessel was "in such a position as to see both the sidelights of the other," and that consequently there is no ground for finding the *Kaituna* to have broken art. 18.

Turning from probabilities to evidence, the officer in charge of the navigation of the *Selje*, when asked whether the *Kaituna* could see both his sidelights, says twice: "I could see his, but I do not know that he could see mine." It is suggested that he said at the inquiry in Australia soon after the collision: "He should have seen my green light"; but he says he does not remember; the inquiry was three years ago, and the evidence given there was not proved, its agreed admission only applying to three *Kaituna* witnesses.

The navigator in charge of the *Kaituna* says he only saw the two sidelights of the *Selje* for a brief moment when the *Selje*, showing her green on his starboard bow, swung round, and he lost the green and saw the red, at a time when the collision could not be avoided, and he, the *Kaituna*, did then port and stop his engines. In my opinion the ground on which the judge has held the *Kaituna* to blame cannot be supported.

The *Selje*, however, attacked the *Kaituna* on another ground—namely, that the right-angled blow shows that the *Kaituna* must have starboarded, as without her starboarding there must have been an impossible amount of porting on the *Selje* to get a right-angled collision. The *Selje* is helped in this contention by the well meant but rather unfortunate excesses of the *Kaituna's* witness in making the *Selje* cross their bows at an angle of 60 degrees and get 3 points on their starboard bow before suddenly porting to a green light. I have considered whether this means bad look-out on the *Kaituna* or merely an excessive estimate in a sudden emergency. The navigating officer of the *Kaituna* steadily denied starboarding, and the judge finds he never did starboard. I appreciate that if he did he would apparently be repeating the mistake, for which *The Orduna* (1) was held liable, of starboarding to help the *Selje* to go clear at a time when the *Selje* could go clear without his assistance, but I can find no ground for interfering with the judge's acceptance of the *Kaituna's* evidence. The *Selje's* story was one of persistent porting for a considerable time without even giving a whistle signal of what she was doing. We were told that the Norwegian owners felt aggrieved that their officers in whom they had confidence were held to blame, but the

(1) [1921] 1 A. C. 250.

third officer admitted that he altered his helm three times without giving a whistle signal, and the judge has found that he got on the starboard bow of the *Kaituna* and then ported to a green light.

In my opinion the *Kaituna's* appeal should be allowed, the *Selje's* appeal dismissed, the judgment below altered and the *Selje* held alone to blame for the collision. The *Kaituna* must have the costs here and below.

GREER L.J. The litigation with which we are concerned in these appeals arose out of a collision between the Norwegian steamship *Selje* and the British steamship *Kaituna* shortly after 10 P.M. on March 29, 1929. Each of these ships put the entire blame for the collision on the other. The learned judge who tried the action in the Admiralty Division found that both ships were to blame, and assessed the relative blameworthiness in the proportions of three to one, adjudging that three-fourths of the total damage should be born by the *Selje*, and one-fourth by the *Kaituna*.

The *Kaituna* is a steel screw steamship of 2042 tons gross and 1208 net registered, 279·5 feet in length and 40·1 feet beam, with engines of 194 h.p. On the night of the collision she was on a voyage from Adelaide to Melbourne. Her load was light, her draught being 6 feet forward and 13 feet aft. The *Selje* was a much larger vessel, 6598 tons gross, and 420 feet in length, on a voyage from Williamstown near Melbourne in Australia to Las Palmas for orders.

About half an hour before the collision, when the ships first sighted one another, their courses were, the *Selje* N. 86° W. magnetic, the *Kaituna* S. 78° E. magnetic. They were then eight to ten miles distant from one another. These courses were crossing courses at the fine angle of 8 degrees. It is obvious that if these courses were kept they would intersect sooner or later; the point of intersection would depend on the speed of the two ships. It seems probable that as the proved speed of each vessel was 8½ knots, if they had both kept their course and speed they would not have met at the point of intersection of their courses but would have crossed in safety. If this be right it would follow that one or other or both of the vessels must have done wrong to bring them into collision. The evidence on behalf of the *Selje* was taken by the trial judge on April 26, 1932, more than three years after the event. The defendants' witnesses were not available in this country, and in order to avoid the expense of a commission to Australia the parties agreed by their solicitors and counsel that the evidence of the captain, the third mate, and the engineer of the *Kaituna*, given at two inquiries at Melbourne, one on April 9, 1929, the other on April 24, 1929, should be used as evidence at the trial. At the first inquiry the owners of the *Selje* were represented, and so had the same opportunity of cross-examining the witnesses, with the view of establishing that the cause of the collision into which the Court was inquiring was the bad navigation of the *Kaituna*, as they would have had if the witnesses had been examined in the action; they availed themselves of that opportunity.

The questions in the action mainly turned on the evidence of the third officer of the *Selje*, and that of the third officer of the *Kaituna*. The trial judge saw and heard the third officer of the *Selje* in the witness-box, and declined to accept his evidence as being within any measurable distance of a reliable account of what happened during the material time when he was on the bridge in sole charge of the navigation of the *Selje*. I am inclined to think that the learned judge was perhaps a little hard on the third officer of the *Selje* when he described him as "a man of very low intelligence and with a poor notion of the rules," and in another part of his judgment as "a mental defective," but it is impossible to read the transcript of the shorthand note without agreeing with the learned judge's view that the evidence of this witness cannot be relied upon, and should not be accepted as affording anything like an accurate account of the events preceding the collision. On the other hand, the third officer of the *Kaituna* gave his evidence in Australia when the events of the night of March 29, 1929, were fresh within his recollection. He gave a clear and intelligible account of what happened. His evidence is not in conflict with the evidence of any witness except that of a witness whom the judge has refused to believe; for my part I think the Court ought to accept his evidence as in the main truthful and accurate, though subject to the critical attitude that should always be adopted to evidence of a navigator given in his own favour, and in favour of the owners of the ship by whom he was employed.

I have come to the conclusion that our judgment in these appeals should be to the effect that the *Selje* was solely to blame. I think the most probable explanation of the collision between these two vessels may be stated as follows. When they sighted one another at a distance of about eight miles their courses were such that they would in all probability have crossed at a safe distance from one another. However this may be, the *Selje* did in fact safely cross ahead of the *Kaituna* from port to starboard. Both vessels were then proceeding in safety, green to green. The *Selje* then, through some unexplained aberration on the part of her third mate, who, imagining his ship would be in danger if she continued her course, ordered his helm hard-a-port, again crossed the bow of the *Kaituna*, possibly for a moment during the swing showing her two sidelights to the *Kaituna* at a time when it was impossible for the latter to save the situation by acting on the end on rule. There is a part of Langton J.'s judgment in which he appears to have adopted this view of the facts. He says: "But even on the supposition that she first saw the *Selje* much nearer than I think she would have me believe, still she did see the *Selje* crossing her bows, and she did see the green light of the *Selje* on her starboard bow." I think it must have been fine on the starboard bow—*nevertheless it was a position of safety.* In those circumstances I do not think she could be blamed for keeping her course. What she did do was, when she appreciated that the *Selje* was performing this suicidal manœuvre of porting to a green light, and actually showing her red light, she then not unnaturally put her engines full astern and did what she could to lessen the collision."

The account given by the third officer of the *Kaituna*, confirmed by the captain, is to the effect that when the ships on their stated courses approached within a distance of two miles of one another the course of the *Selje* led her over from the port side of the *Kaituna* to about a point or point and a half on the starboard side. She then straightened up by what he thought might be merely a sheer, but it turned out to be the result of helm action, as she came round and ultimately showed her two sidelights when it was impossible to avoid collision. The third officer of the *Kaituna* stated at the first inquiry that he first saw the *Selje's* green light about ten minutes before he took the bearing of Cape Otway. When he took the bearing of Cape Otway it was about three minutes to ten. He saw that the masthead lights of the *Selje* were widening out, she was a point on the port bow and appeared to be about to cross the bow of the *Kaituna*. She did so cross when the ships were about two or three miles apart, and she then seemed to steady on her course parallel to the *Kaituna*. When she was about six ships' lengths away, about a quarter of a mile, she swung round, and he then saw both red and green lights and immediately ordered his engines hard astern and shouted to the captain. The captain of the *Kaituna* said in his evidence at the same inquiry that he came off the bridge at ten minutes to ten, that the *Selje's* lights were then a point on the port bow, masthead lights well open, and green light showing. He remained on the bridge until she crossed. The third officer then took a bearing of Cape Otway, and the captain then went below to his cabin. It seems to me incredible that the captain would have gone to the cabin unless he had satisfied himself that there was then no risk of collision. He was called up at 10.3 and then saw the *Selje* across the *Kaituna's* bow. He observed that the telegraph was at full speed astern, and asked the third officer: "Are the engines full speed astern and the helm hard-a-port?" and received an affirmative reply. In my judgment,

C. A.
1933

THE KAITUNA.

Greer L.J.

if these ships were ever on courses in which the end on rule applied, they had got out of danger into safety when the *Selje*, having the *Kaituna* on her starboard hand, crossed a second time in front of the *Kaituna*, brought the crossing rule into operation, broke it, and became responsible for the collision which resulted in her total loss. The *Kaituna* in my judgment was not to blame. She kept her course and speed until the action of the *Selje* made a collision inevitable, and then unsuccessfully tried to avoid a collision or in any case to mitigate the damage it would cause. I agree with the learned judge's finding that the *Kaituna* did not starboard.

Langton J., after consulting the Elder Brethren, decided, I think with some reluctance, that the case was one in which the duty of both ships was to act under art. 18 of the Regulations for the Prevention of Collisions at Sea, known as the end on rule, and not under art. 19, known as the crossing rule. Art. 18 states quite distinctly how an end on case is to be judged by night. By night it applies only to cases in which each vessel is in such a position as to see both sidelights of the other. It does not, of course, mean that when the vessels are, say, five or six miles apart they are then to act under the rule, but only if they are meeting end on in such a manner as to involve risk of collision, and it does not apply to two vessels which will, if both keep their respective courses, pass clear of each other. In my judgment, when these two vessels sighted one another they were vessels which, if both kept their respective courses, would in all probability pass clear of each other; I am also satisfied that before any risk of collision arose they had in fact, as the judge says in the passage I have quoted, passed clear of one another into a position of safety. If this be right, I cannot understand how any blame can attach to the *Kaituna* because she failed in time to anticipate that the *Selje* was going to convert the safe green to green position into a case in which the vessels would momentarily be end on at a time when obedience to the end on rule could not prevent the collision. I agree that in all probability the *Kaituna's*

C. A.
1933

THE KAITUNA.

Greer L.J.

witnesses in Australia may have failed to accurately estimate the distance of the *Selje* from the *Kaituna* when she first crossed, and the distance which her lights got on to their starboard bow, but these distances must necessarily be only approximate. Notwithstanding the fact that they may have over or under-estimated these distances, I think their evidence should be accepted to the extent that the *Selje* had crossed into a position of safety before she ported her helm and came round across the course of the *Kaituna* and so brought about the collision. There is nothing in the assessors' answers to the questions submitted to them inconsistent with this view of the cause of the collision between the two ships.

For these reasons, I think the *Selje* was alone to blame for the collision, and the appeal of the *Kaituna* should be allowed with costs here and below, and judgment should be entered declaring the *Selje* alone to blame, and the appeal of the *Selje* should be dismissed with costs here and below.

ROMER L.J. The first and the most important question arising on this appeal is whether the two vessels involved are to be considered as having been meeting end on or nearly end on within the meaning of art. 18 of the Regulations, or as having been crossing within the meaning of art. 19. In view of the explanatory portion of the former rule the question may be stated thus: Was each vessel in such a position as to see both the sidelights of the other at the material time ?—the material time being the time when the necessity for precaution begins; that is to say, when there is a probability of a risk of collision.

In order to determine this question it becomes necessary in the first place to ascertain what is the meaning to be attributed to the words, "in such a position." In ordinary cases in which each vessel is kept constantly upon its course, as will happen when the water is reasonably smooth and the helmsman knows his business, no difficulty can arise. But supposing that by reason of a heavy swell or otherwise one of the vessels, while in general only showing one of her sidelights to the other, yaws from time to time so that she now and then shows both her sidelights, is that vessel at the moment of yawing to be deemed to be in such a position as to show both her sidelights to the other within the meaning of the rule. In my opinion she is not. The regulations are, after all, Regulations for Preventing Collisions at Sea, and may properly be construed in case of doubt in such a way as to prevent collisions rather than to make them inevitable. If, for instance, two vessels are sailing on parallel courses showing green to green, and both suddenly yaw so that each vessel momentarily sees both lights of the other and thereafter sees the green only, it would seem extravagant to treat them as being both obliged to port their helms by reason of a rule designed to prevent collisions at sea. And yet in one sense each vessel is at the moment of yawing in such a position as to see both the sidelights of the other. If, however, the words "in such a position" are read, as I think they should be read, as referring to the ship's general course, there would be no necessity for porting under art. 18. The fact of the yawing, however, would be a circumstance imposing upon each vessel the necessity for caution. Art. 18 is expressly stated not to apply to two vessels which must, if both keep on their respective courses, pass clear of each other, and the subsequent reference to the sidelights would seem to be inserted for the purpose of indicating a method of ascertaining at night what the respective courses are. Even a vessel that is yawing can have no difficulty in knowing in substance what her own course is and to what extent (say) her port light may be visible to another vessel on her starboard bow. Her estimate of the course of the other vessel will depend upon the extent to which she sees both sidelights of that vessel. If in either case one of the sidelights of the vessel is only occasionally seen, the vessels are not in my opinion meeting end on or nearly end on, so as to involve risk of collision. If this be so, the answers given by the assessors on the present appeal to the questions put to them by the Court clearly indicate that the two vessels were not within art. 18, but were crossing vessels within the meaning of art. 19, the *Selje* having the *Kaituna* on her starboard side. For we are told by the assessors that the *Kaituna* might possibly see both sidelights of the *Selje* occasionally though not necessarily, and that the *Kaituna* would be generally seeing the *Selje's* green light, by which they obviously meant would be seeing her green light only. These answers of the assessors, deduced merely from the pleaded courses, speeds, draughts, swell and wind, and the fact that the *Kaituna* was very light forward, are in my opinion confirmed by the evidence of the witnesses. For the witnesses on board the *Kaituna* swore that they did not see the red light of the *Selje* until the latter ported shortly before the collision, while the officer of the watch on the *Selje* at the material time said that he did not know if the *Kaituna* could see both the *Selje's* lights. Now the *Selje* was not yawing much. Her third officer said she yawed half a point at the most. She had obviously crossed the *Kaituna's* bows some little time before the collision and on a course at an angle of 8 degrees to that of the *Kaituna*, the navigating officer on the *Kaituna* estimating this distance at the time as being two or three miles. Even when yawing to the maximum extent, therefore, the *Selje's* red light could not have been visible on the *Kaituna*, unless that light could be seen across the *Selje's* bows to the extent of 2½ degrees. If it could, it means that the light was not screened to the extent required by art. 2 (*d*). If, however, this article had not been complied with, and I understand that some slight departure from it is not uncommon, it was for the *Selje's* witness to prove the existence of and extent of such departure, seeing that the onus lay upon the plaintiffs to prove their allegation that the case fell within the end on rule. If the red light of the *Selje* could have been seen across her bows to the extent of 2½ degrees, her navigating officer must have known it. I therefore deduce from his evidence that it could not. The case, therefore, not falling within the end on rule, the only other question of fact is whether or not the *Kaituna* starboarded before the collision as suggested by the respondents. This suggestion was rejected emphatically by Langton J., and in my opinion rightly so. It is no doubt difficult to see how with the admitted courses of the two vessels the *Selje* could have got at right angles to the *Kaituna* unless the latter had starboarded. But the estimate as to distance, bearings and times is most unreliable on both sides, and it is impossible to say with certainty what were the relative positions of the two vessels at any particular time before the collision. If, for instance, the *Selje* crossed the bows of the *Kaituna* at a considerably greater distance than three miles, she might conceivably have got to such a position on the starboard bow of the *Kaituna* as that by porting she would bring herself in front of the *Kaituna* nearly at right angles. But, in any case, I do not think that any mathematical difficulty in accounting for the existence of a right angle, that is itself somewhat problematical, should induce the Court in face of the explicit denials of those in charge of the *Kaituna* to hold that they performed so extraordinary and so unnecessary a manœuvre as starboarding her helm.

In my opinion the appeal of the defendants should be allowed and that of the plaintiffs dismissed, with the consequences stated by Scrutton L.J.

Appeal allowed.
Cross-appeal dismissed.

Solicitors for the appellants: *William A. Crump & Son.*
Solicitors for the respondents: *Thomas Cooper & Co.*

E. C. M. T.

THE BAARN.

C. A.
1933
June 22, 23, 26; July 3.

Shipping—Collision—Damage to Chilean Vessel—Action in rem—Bail—Admission of Liability—Consent to Reference—Vessel repaired in Chile—Items of Claim in various Currencies—Payment in Chile in Chilean Currency—Fall in Exchange Values—Validity of Payment.

A Chilean vessel owned by the plaintiffs received damage while at anchor in the territorial waters of Ecuador through being run into by a Dutch vessel owned by the defendants. The Dutch vessel was arrested in this country, and her owners put in bail, admitted liability, and consented to a reference to assess the damage. The admission and consent were filed in the registry and became an order of Court.

The Chilean vessel was repaired in Chile, and the plaintiffs filed their claim and vouchers comprising some 70,000 Chilean pesos and some small sums in Ecuador sucres, U. S. dollars, and sterling, the whole amount quantified into sterling being claimed at 2533*l.* 19*s.* 1*d.*

Under Chilean law a debtor can make a valid payment, even against the will of the creditor, by depositing the amount owed in a Chilean bank in the name of the creditor, and, the exchange value of the peso having fallen heavily, the defendants deposited in a bank at Valparaiso 80,000 pesos in the plaintiffs' name, an amount which the defendants alleged was more than sufficient to cover the whole claim with interest at 6 per cent. On the plaintiffs' application for a day to be fixed for the hearing of the reference, the defendants, on the ground that the claim had been paid in full, moved to have the action dismissed and the bail discharged.

Langton J. held that so far as the payment related to the claim in pesos it was a good discharge, but having regard to the fall in the exchange it was not necessarily a good discharge for the items of the claim in other currencies, and that so far as they were concerned there must be a reference to the registrar to report whether the amount deposited in pesos was in fact sufficient to cover these items with interest. Both parties filed notice of appeal. Before the appeal was heard, however, the plaintiffs accepted a sum tendered in respect of the small items in currencies other than the Chilean pesos, and the appeal was confined to the question whether the payment in Chile of the 80,000 pesos in respect of repairs and demurrage was a good discharge:—

Held, that on the evidence there was no final decision by the Chilean Courts that the payment in depreciated pesos was sufficient, while proceedings were still pending in the English Court; that accordingly the reference must proceed, and that the registrar must treat the payment in Chile as a payment on account of the sums expended and lost in pesos in respect of the repairs and demurrage, and ascertain, in accordance with the decision in *The Volturno* [1921] 2 A. C. 544, the amount due to the plaintiffs by converting the sums so expended and lost into sterling at the rate of exchange prevailing at the time the pesos were paid or lost.

Decision of Langton J. (1932) 49 Times L. R. 132 reversed.

Société des Hôtels Le Touquet Paris-Plage v. *Cummings* [1922] 1 K. B. 451 considered and distinguished.

APPEAL by the plaintiffs from a decision of Langton J. on a motion by the defendants, the owners of the Dutch steamship *Baarn*, asking for an order that the action be dismissed and that the defendants and their bail be discharged or, alternatively, that the action and all proceedings thereunder should be stayed.

The following statement of the facts is taken from the judgment of :—

LANGTON J. The collision out of which the action arises took place on August 15, 1931, within the territorial waters of the State of Ecuador, and at a moment when the plaintiffs' vessel, the *Bio Bio*, was at anchor. The plaintiffs are a a Chilean company and the *Bio Bio* is a Chilean steamship. In September, 1931, the repairs to the *Bio Bio* were completed in Chile, and in January, 1932, the *Baarn* was found within British jurisdiction. A solicitors' undertaking was given by the defendants' solicitors to appear and put in bail, and on January 25, 1932, the writ in the action was issued. On January 27 the undertaking was given in the sum of 3750*l.*, and on February 3 the defendants entered an appearance. On February 17 the defendants made a formal admission of liability, and that admission, signed by the solicitors for both parties, was filed in the Registry, together with a consent to a reference. Under Order LII., r. 23, that admission of liability and consent had the effect of an order of Court.

On March 11, 1932, a summons was issued by the defendants calling upon the plaintiffs to file their claim and vouchers in the reference, and on March 17 that order was complied with. On March 18 bail was completed and lodged in Court.

On October 14 the plaintiffs applied for a day for the reference to be fixed. But on that day the defendants brought to the notice of the registrar the fact that in the intervening months since the claim had been filed certain steps had been taken which they claimed made it unnecessary for a reference to be held. To put the matter in a word, they said: "We have paid in Chile." The registrar, confronted with that asseveration, adjourned the summons to fix a day in order that the defendants might, if they saw fit, apply for a stay of proceedings. In that position the matter came before me on the plaintiffs' application for a reference. It seemed to me that the convenient course to pursue would be to fix a day for the reference, and at the same time give to the defendants an opportunity of raising this plea of payment by way of motion. It is in those circumstances that the matter is now before me.

The first point is whether any payment such as is claimed by the defendants to have been made is an effective payment in the circumstances, and so far as I know this proceeding is an entirely new one. What the defendants did was to go to Chile in June, 1932, and there tender to the plaintiffs a sum somewhat in excess of the actual total claims in Chilean pesos, and, when the tender was refused, to take such steps as they were advised would be accepted under Chilean law to complete payment against the will of the plaintiffs. It might be asked why were the plaintiffs unwilling to take and accept in their own currency money which would be sufficient to reimburse them for expenditure in their own currency? —and the answer is that there has been a disastrous and calamitous downward trend in the exchange value of the Chilean peso.

The question, therefore, is whether that payment in Chilean currency to Chileans for expenses which they have incurred in Chile is a good discharge in law. I have to bear in mind, however, the fact that an admission of liability has been obtained; that bail has been completed; and a consent to a reference, which is an order of the Court, has been filed. It is upon that ground that Mr. Hayward laid the stress of his objection—namely, that the order of the Court is in effect a direction to the registrar to assess, that he has nothing more to do than to perform a ministerial function of the Court in assessing, and that it is too late for any one to come forward and ask that the action should be dismissed by a plea of payment. To put it in another way, Mr. Hayward said the time for plea is before defence; in this case there was no defence, if there was no defence there is no room now for plea. I have not overlooked the force of those contentions in arriving at the judgment at which I have arrived.

First, I have to consider whether I can derive any guide from previously decided cases in matters of this class. Apart from the stage of judgment having been reached, I have a clear guide in respect of the payment of a foreign debt in the currency of that foreign country accompanied by a plea of payment in the case which is generally referred to as the *Le Touquet* case. (1) In that case a lady who had incurred a debt in France to a hotel in Le Touquet, in 1914, sought to discharge that debt, after action brought, but before judgment, by paying to the hotel in 1919 the sum sued for in francs. Avory J. thought that that was not a good discharge of the debt, but the Court of Appeal—although one member of it was not altogether pleased with the particular manner in which the proceeding was initiated and carried through—thought that it was a good discharge. That, so far as it goes, is a binding authority upon me, and not one from which I should want to differ even if I could. The mere fact that the currency of a country has suffered a depreciation in relation to foreign countries is by that judgment an irrelevant circumstance, when payment is made of the actual sum in that currency, in that country, at a time which is proper.

But that decision does not carry me the whole way, because there is here the further circumstance that judgment has, in a sense, passed.

The question, therefore, now resolves itself into this form: Having the authority of the *Le Touquet* case (1)—and for the moment assuming that the payment in Chile was an effective payment—does the fact that this order of the Court exists makes a material difference to the position? [His Lordship dealt with this point (a point which it became unnecessary for the Court of Appeal to decide), referred to *The Consett* (1), and said that he saw no reason why, if the defendants could tender—as unquestionably they could—the order of Court should bar the defendants from settling the claim by payment. His Lordship continued as follows :] If that be the right conclusion, the only point that remains for consideration is whether this proceeding which took place in Chile does, or does not, amount to a payment of the plaintiffs' claim ? I have considered all the various incidents of the bail and the undertaking and the position thus secured to the plaintiffs. It is true the plaintiffs elected to initiate their suit here, but if they had been paid here they could have had no objection. Does it, therefore, make any difference that instead of being paid here in sterling they are paid in pesos in Chile ? I do not think it does. Therefore, I have finally to address myself to the question whether this payment in Chile was a good payment.

---

(1) [1922] 1 K. B. 451.

On this point affidavit evidence has been filed. The defendants have filed an affidavit of a Chilean lawyer of eminence who advises the Embassy here, a M. Carlos Manuel Pereira, who puts his evidence in the convenient form of exhibiting the relevant Articles of the Civil Code of the Chilean Republic. If properly translated—and there has been no challenge as to their translation—they are to my mind sufficiently clear. Art. 1598 of the Chilean Code provides that : "For a payment to be validly made, it is not necessary that it should be made with the consent of the creditor ; the payment is valid even if made against the will of the creditor, by the 'consignation' of the value or thing owed." The word "consignation" is in inverted commas and is, as I understand it, an attempt to render into English a difficult Spanish expression. But there is no doubt as to what is meant by this word "consignation," which I think is better expressed by the word "deposit," provided "deposit" is understood in the sense in which this deposit was made in Chile. I will now state what was done in Chile in order that it may be understood how this Article is applied according to the evidence from Chile. The plaintiffs having stated their claim in a sum which, calculated in pesos at the time, came to 71,000 odd pesos, the defendants, bearing in mind that interest also was payable, went to Chile and offered the plaintiffs 80,000 pesos. The plaintiffs having refused what seems, on paper, a generous offer (but which, if it was merely paper, is perhaps not so generous as it seems), the defendants made payment by "consignation." The method is that the party wishing to make the consignation goes before a judge in Chile and formally pays in the money, which is then deposited in a bank named by the Court—in this instance the Bank of Chile. The plaintiffs took objection to the jurisdiction of the Court, and the same judge who had accepted this payment by consignation then considered the point at the instance of the plaintiffs as to whether he had jurisdiction to act in the way in which he had acted. He decided that he had jurisdiction. The plaintiffs, not content with that decision, went to the Court of Appeal, the highest tribunal to which they could go in Chile, and that Court by a majority of two to one decided that the judge of first instance was right and that he had jurisdiction to act in the way that he did.

---

(1) (1880) 5 P. D. 77.

In these circumstances, M. Pereira in his affidavit states on the strength of arts. 1598, 1599, 1600, 1601, and 1602 that this payment is a good payment, according to Chilean law. Against that I have an affidavit somewhat belatedly put forward on behalf of the plaintiffs by M. Videla, who criticizes the view of M. Pereira. Unfortunately, however, he does not deal with what appears to me to be the real point in the case—namely, the articles of the Civil Code; he does not tell me what, for example, art. 1598, which I have read in extenso, means, if it does not mean that for which M. Pereira contends, and I have to make up my mind on this question of fact as to what is the foreign law as regards payment in Chile. Weighing those two affidavits and weighing also what appears to me to be the plain meaning of art. 1598 of the Chilean Code, I have no doubt that this payment is good according to Chilean law. Be it understood at once that it has never been contended by Mr. Miller for the defendants that this matter was in any sense res judicata because a question of Chilean law and a question as to the jurisdiction of a Chilean Court happen to have been introduced. He merely uses the judgment of the Chilean Court to prove that the defendants made, according to Chilean law, a good payment of 80,000 pesos. Whether that is a proper payment in satisfaction of the plaintiffs' claim is, as Mr. Miller admitted, a matter for this Court to determine and not, in any sense, a matter for the Chilean Court to determine, so that there has been no conclusion upon that score.

I find myself, after determining the question of fact in favour of the defendants, in this situation. A claim has been put forward by the plaintiffs. Their claim has been quantified in sterling: it could only be the subject of a final judgment in this Court in sterling because this Court knows no other currency in which to give judgment. But before the case has gone to the official who has to assess the amounts of the various items the defendants have come forward and have offered, in satisfaction of the whole of the claim, a certain sum in Chilean pesos. So far as the Chilean law is concerned they have actually paid the pesos, and I must treat it, according to my finding, as a payment. But that does not conclude this somewhat involved and difficult transaction, because, although by far the bulk of it was in respect of expenses incurred in Chile, in Chilean currency, there were a few small items which were not so incurred; and I have had to consider whether a payment in Chilean pesos is necessarily a good discharge of a liability incurred by the plaintiffs in other currencies altogether. If the currency of Chile to-day has a merely nominal value, it seems to me to follow that the payment of even a large excess of the plaintiffs' claim in Chilean pesos may be quite inadequate to reimburse the plaintiffs for payments that they may still have to make in other currencies. Therefore I shall direct that the reference shall proceed in respect of those items of the claim. In addition the question of interest will have to be considered by the registrar in the light of the direction I have given as to the way in which the payment of Chilean pesos is to be regarded. That is to say, there must be no reopening before the registrar of the principle that a payment has been made, but I would like the assistance of the registrar on the question whether the payment in pesos covered the proper rate of interest as it would be normally determined in the registry. It will be sufficient if he says, assuming that the pesos payment, as this Court has ruled, is a good payment, there is a sufficient sum in pesos to cover the rate of interest which he adjudges. The costs will be reserved. Leave to appeal.

Both parties filed notice of appeal, but before the appeal was heard the plaintiffs accepted a sum tendered in respect of the small items in currencies other than the Chilean pesos, and the appeal was confined to the question whether the payment in Chile of the 80,000 pesos in respect of repairs and demurrage was a good discharge on those items of the claim.

R. F. Hayward for the appellants. The plaintiffs are entitled to a reference. Payment of pesos in Chile against the plaintiffs' will in debased currency is not accord and satisfaction. The claim is not for pesos but for damages, and the question is, What are the 80,000 pesos worth in this action ? It is not a liquidated claim, and the foreign currency is merely evidence in the ascertainment of the damages.

[GREER L.J. This is a claim for damages for tort. Cannot the defendants go to the plaintiffs' own country and say : " We have ascertained you have lost or paid out so many pesos, and here they are " ? What answer would the plaintiffs have had if they had then brought an action in England ?]

The plaintiffs cannot dispute that it was good payment of 80,000 pesos according to Chilean law, that is a question of fact found in favour of the defendants; but the Chilean Courts did not decide the sufficiency of the payment. This is not an action on a debt as in *Société des Hôtels Le Touquet*

Paris-Plage v. *Cummings* (1), which is distinguishable on that ground and also on the further grounds that the debt in that case was a debt of francs, payable in France, and paid without protest before judgment.

[SCRUTTON L.J. The judgment of Atkin L.J. in that case appears to be somewhat against you.]

The damage must be measured in sterling at the rate of exchange prevailing at the time the pesos were lost: *The Volturno.* (2) A maritime lien gives rise to damages in the currency of the country where the ship is arrested, and the defendants' agreement to assess the damages in sterling before the registrar has not been rescinded or appealed from. If the defendants are right it is useless to extract bail, for a wrongdoer can still escape by payment elsewhere in a debased and frozen currency, and so get that benefit which is forbidden to either party by *The Volturno.* (2)

[GREER L.J. But you are trying to get that benefit by suing in the country of your choice.]

This was the only country in which the plaintiffs could find the defendants' vessel and arrest her. The defendants do not owe pesos, and the plaintiffs are not bound to accept them.

[SCRUTTON L.J. referred to *In re British American Continental Bank, Ld. (Crédit Général Liégeois*' claim) (3) and *Peyrae* v. *Wilkinson.* (4)]

The Chilean proceedings were not on the merits and no question of estoppel arises: cf. *The Delta.* (5) If the payment is a good discharge, it would be a good discharge for the items in other currencies which the defendants have now paid in sterling.

[Reference was also made to *The Christiansborg* (6); *McHenry* v. *Lewis* (7); and *The Consett.* (8)]

Cyril Miller for the respondents (defendants). The questions are (i.) what view the Court takes of the transaction in Chile, and (ii.) whether, if it amounts to payment of the Chilean pesos paid out by the plaintiffs, that is good

(1) [1922] 1 K. B. 451.
(2) [1921] 2 A. C. 544.
(3) [1922] 2 Ch. 589.
(4) [1924] 2 K. B. 166.
(5) (1876) 1 P. D. 393.
(6) (1885) 10 P. D. 141.
(7) (1882) 22 Ch. D. 397.
(8) 5 P. D. 77.

payment in the English action. The fallacy in the plaintiffs' argument is that there is any materiality in the fact that Chile has gone off the gold standard. The parties are Chileans and Dutchmen, and the question must not be looked at with any regard to English underwriters. The plaintiffs were paid in their own currency and the currency in which they paid the repair bill. The currency may be depreciated as regards England, but not to Chileans in Chile. Before the English Court took the final steps in the action it ascertained that the plaintiffs had suffered no damage, and it never got to the moment when conversion into sterling had to be done. If the 80,000 pesos had been paid before action brought, obviously no claim could have been brought. Fluctuations in exchange are too remote: *The Volturno* (1), and that case is really in the defendants' favour.

[SCRUTTON L.J. Suppose a month before the trial the defendants had paid into Court here the amount of pesos represented by the damage, but paid it in in sterling at the current rate, the Court would have to assess the pesos at the rate of exchange prevailing at the date of the loss, and the defendants would not have paid in enough, according to *The Volturno*. (1)]

That is because in this country you can only tender in sterling. No doubt the defendants got an advantage by going to Chile, but to that they were entitled on the judgment in the *Le Touquet* case (2), and the question of exchange does not arise. The nature and effect of the transaction must be decided according to Chilean law: see *Republica de Guatemala* v. *Nunez*. (3) There has been a transfer of movable property, i.e., money, and that transfer is equivalent to payment according to Chilean law. It is immaterial that it would not be a good transfer by English law: see *In re Maudslay, Sons & Field* (4) and *Embiricos* v. *Anglo-Austrian Bank* (5); in both these cases the transactions in English law would have been null and void.

(1) [1921] 2 A. C. 544.
(2) [1922] 1 K. B. 451.
(3) [1927] 1 K. B. 669.
(4) [1900] 1 Ch. 602.
(5) [1905] 1 K. B. 677.

[SCRUTTON L.J. What is troubling us is that it does not appear to have been decided by the Chilean Courts that the payment was sufficient.]

The defendants paid the whole debt, the plaintiffs claimed 71,000 pesos and were paid 80,000, and could not get more in a Chilean Court.

[ROMER L.J. The Chilean Courts assumed two things, both untrue—namely, that the claim and liability to pay were in pesos, whereas the plaintiffs were claiming sterling, and the defendants had admitted their liability to pay sterling.]

The plaintiffs had no right to damages capable only of being satisfied in sterling: see the *Le Touquet* case. (1) There is no logical difference in principle between contract and tort where the claim in tort is quantified and, as in the *Le Touquet* case (1), accord is unnecessary: see also *Cumber* v. *Wane*. (2) The debt is discharged if sufficient tender is refused, subject to this, that in England it must be brought into Court: see Order XXII., rr. 1 and 2.

[SCRUTTON L.J. referred to *The Mona*. (3)]

It is the common practice to make a tender after decree and before reference. Before judgment, if the Italian law had allowed it, the defendants could have paid lira in *The Volturno*. (4)

Hayward replied.

Cur. adv. vult.

July 3. The following judgments were read:—

SCRUTTON L.J. This appeal is against an order of Langton J. He was asked to dismiss an action in rem in the Admiralty Division on the ground that the claim of the plaintiffs, domiciled in Chile, had been satisfied by a good payment in Chile under the laws of that country. He stayed the action so far as it related to expenses and losses incurred by the plaintiffs in Chile for repairs and detention of their ship, but allowed the reference to proceed as to certain small expenses in Ecuador and England. Both sides appeal against

---

(1) [1922] 1 K. B. 451.
(2) (1719) 1 Stra. 426.
(3) [1894] P. 265.
(4) [1921] 2 A. C. 544.

C. A.
1933

THE BAARN.

Scrutton L.J.

this order, but, as the latter small expenses have since been satisfied by payment here, the cross-appeal was not argued, and the case came before us as the appeal of the plaintiffs against the order depriving them of a reference on their claim for the Chilean expenditure and losses.

The real point in dispute between the parties arose from a fall in value of the Chilean peso, as compared with sterling, with the result that to pay the claim in pesos at the time it was said to be paid would give the claimant a smaller amount in sterling than he would get if he received in England judgment in sterling in the action.

The relevant facts are these. The plaintiffs are a Chilean company, owning a steamer, the *Bio Bio*. In August, 1931, the Dutch steamer *Baarn* ran into and damaged the *Bio Bio* while she was lying at anchor on the high seas, and therefore within the jurisdiction of the English Admiralty Court, off Guayaquil in the Republic of Ecuador. Small expenses amounting to 26*l*. 5*s*. were incurred in Ecuador by the plaintiffs in Ecuador and United States currency. The plaintiffs then took the *Bio Bio* to Valparaiso in Chile for repairs, and incurred there expenses of repair and losses by detention amounting to 70,500 Chilean pesos, which, if turned into sterling according to the decision in *The Volturno* (1) at the time they were incurred, amounted to 2505*l*. Further small expenses in England were claimed at 28*l*. 8*s*. 6*d*.

The claimants could then take one or other or both of two steps: (1.) they could sue the owners of the *Baarn* either in Holland, where they were domiciled, or wherever they could find them; (2.) they could arrest the *Baarn* in rem wherever they could find her. Unless the owners were sued in England or the *Baarn* arrested in England, sterling could have nothing to do with the assessment of damages. They took the latter course, and in February, 1932, arrested the *Baarn* in England, thus founding an action in the English Admiralty Court. The solicitors for the *Baarn* on February 17, 1932, admitted liability and consented to the damages and interest due to the plaintiffs being referred to the registrar and merchants for assessment. This consent on being filed became an order of the Court. During the spring of 1932 the *Baarn's* solicitors apparently considered that the decision of this Court in the *Le Touquet* case (1), in which a defendant successfully paid a French debt in depreciated francs, while an action was pending in England to recover it in sterling assessed at a time when francs had more relative value, might be of some service to them. They accordingly ascertained there was a proceeding under Chilean law by which a person owing might tender to the creditor the " value or the thing owed," and if the creditor would not accept it, might with the sanction of the Court deposit the " thing owed " in a bank, so that it would be payment to the creditor of the thing owed. But (art. 1606) the debtor might withdraw the deposit before the creditor accepted it; or " before the deposit has been declared by a judgment res judicata (final judgment)." On June 15 the representatives of the *Baarn* offered the plaintiffs the sums they claimed in the currency in which they were incurred, and asked the plaintiffs " to send for them." The plaintiffs declined and said the matter must be settled in London. Thereupon, those representing the *Baarn* started Chilean proceedings, apparently in June, and asked the judge " to order that the offer of payment by delivery as above be made for all legal purposes." The judge ordered: " Let the offer be made." The offer was accordingly made and declined. The *Baarn's* representatives asked the judge that the delivery of the sum stated to the Bank of Chile be authorized. Thereupon the judge on June 25 " authorized the delivery, and let notice be given to the Bank of Chile in whose possession the money will remain and let summons be served on the creditor and the 27th June is fixed for the deposit." Notice was accordingly given and the sum paid into the Bank of Chile, and notification given to the plaintiffs advising them to receive the deposit. This the plaintiffs declined to do.

---

(1) [1921] 2 A. C. 544.

---

(1) [1922] 1 K. B. 451.

The plaintiffs then took action, and in July raised objection denying jurisdiction, stating that the matter was being ventilated in London, and that the owners of the *Baarn* "desired to take advantage of the depreciation which has occurred in our currency, so as to settle for a miserable sum losses which we suffered a year ago and which for the most part we had to pay then in the gold currency which was then current." The plaintiffs then asked the judge "to accept their opposition to the aforesaid payment by deposit and to declare his incompetence to settle the question at issue as to whether the amount offered by the other side is or is not sufficient to discharge its debt, because this case is being ventilated by the parties before the British Courts." The owners of the *Baarn* opposed, saying (inter alia) that "if the plaintiffs still wished to discuss the sufficiency of the payment made they had a suitable means of doing so by bringing the necessary action in the ordinary Courts which are of wide experience, which is the only legal method for discussing this question." The judge's judgment is "holding that it is not for these proceedings to deal with the request made, it is declared there is no ground for the same without prejudice to any other rights of the plaintiffs." Thereupon the plaintiffs appealed, and the Court of Appeal, the final Court in this matter, by a majority dismissed the appeal. The reasons of the majority are not stated; the dissenting judge appears to have thought that the lower Court should have decided the place of payment. The question of sufficiency of payment is not mentioned, and probably the Court never heard of the decision in *The Volturno* (1) or the *Le Touquet* case. (2)

I am of opinion, having considered the evidence, that there is no final decision by the Chilean Courts that the payment in depreciated pesos is sufficient, while proceedings are pending in London. There is no such express decision; the judge appears to assume that the question can still be raised in the ordinary Chilean Courts and reserves the right of the plaintiffs to do this. This, in my view, is sufficient to decide the case in favour of the appellants.

(1) [1921] 2 A. C. 544.

(2) [1922] 1 K. B. 451.

But I should desire to say a word or two as to other difficulties which may arise. I take the decision in *The Volturno* (1) to be that damages in tort are to be assessed at the time of breach and not at the time of the judgment.

Now the damage to the *Bio Bio* was done in the waters at Ecuador, and repairing it would inflict damage on the owners, Chilean subjects domiciled in Chile. If these owners had sued in Chile, either by successfully serving in Chile the owners of the *Baarn* there through their agents, or by arresting the *Baarn* in Chile in rem, it is not clear that the question of depreciated pesos would assist the plaintiffs. I take it that if a tort had been committed in England before England went off the gold standard, the plaintiffs could not say: "We insist, after England has gone off the gold standard and the pound has depreciated in international purchasing power, on being paid the value of the gold standard pound at the time of the commission of the tort." A pound in England is a pound whatever its international value. So, according to the *Le Touquet* case (2), "the plaintiffs, who were owed 18,035 francs payable in France, must be content with 18,035 francs paid in France," though the franc had depreciated internationally between 1914 when the debt was incurred and 1921 when it was paid, and though there were proceedings in England.

I note that P. O. Lawrence J. in the *Crédit Liégeois* case (3) was of opinion that this Court in the *Le Touquet* case (4) held there was accord and satisfaction; there is clearly some misunderstanding here, as all the members of the Court (Bankes L.J., myself, and Atkin L.J.) rightly or wrongly held there was no accord and satisfaction. I have some difficulty in seeing how a domiciled Chilean, suffering damage measured in Chilean pesos, can rely on the depreciation of his own currency, by selecting a country to sue in whose currency is not subject to such depreciation.

The difficulty may be tested by considering an action in Germany for a foreign tort brought to judgment during the period when the German mark had become practically worthless, though it was of value when the tort was committed. It is not necessary to decide the point, as I have held there was here no payment by Chilean law, and therefore the English proceedings cannot be stayed; but I mention it as I do not think the results of the decision in *The Volturno* (1) have yet been thoroughly elucidated.

---

(1) [1921] 2 A. C. 544.

(2) [1922] 1 K. B. 451, 461.

(3) [1922] 2 Ch. 589, 596.

(4) [1922] 1 K. B. 451, 456, 460, 464.

In my opinion the appeal must be allowed and the order appealed from set aside, with costs here and below.

GREER L.J. The plaintiffs are a Chilean company whose ship the *Bio Bio* came into collision with the *Baarn* near Guayaquil, Ecuador, on August 15, 1931. The defendants are a Dutch company who own the last named vessel.

The plaintiffs, finding the Dutch vessel within the jurisdiction of the Admiralty Division, by writ dated January 25, 1932, commenced an action in rem against the steamship *Baarn*, serving the writ in the usual manner on the ship, then in this country. Appearance was entered in due course on February 3, 1932, and thereafter on February 17, 1932, the solicitors for the plaintiffs and the defendants signed an undertaking under which the defendants admitted liability and consented to the damages and interest due to the plaintiffs being referred to the registrar and merchants for assessment. This admission was duly filed in the registry. Thereupon by Order LII., r. 23, the said agreement became an order of the Court and had the same effect as if an order had been made by the judge. I think this means, according to the practice of the Court, that it was equivalent to an order referring the assessment of the damages to a registrar, and if he desired assistance of merchants, to the registrar and merchants, for a report. It was not equivalent to a judgment for such damages as should be found by the registrar and merchants. It was only an order for reference and report, and the judgment would not be drawn up and would not be dated until after the report had been made and confirmed by the Court. In this respect the practice is equivalent to that which sometimes prevails in the King's Bench Division, where an order is made sending the case to a referee to report, and is not equivalent to a judgment for such sum as may be found by a referee. In the latter case the practice is that the judgment should be dated at the time the judge made the order of reference, the amount being inserted at a later date. No doubt in this case the liability would be merged into a judgment debt at the date of the judgment, but in the present case there has been no judgment, and therefore no merger. Bail was given by the defendants in the sum of 3750*l.* on March 18, 1932, the plaintiffs having filed their particulars of claim on March 17, 1932.

---

(1) [1921] 2 A. C. 544.

Before any reference was held, an application was made to the judge to dismiss the action and discharge the bail on the ground that the defendants had paid the claim. The judge thereupon made the order of November 25, 1932, which in effect declared that the items of the claim numbered 7 to 14 could no longer be considered by the registrar, inasmuch as they had been paid, and the reference could only proceed with regard to the other items. The grounds on which the application was made were as follows. The items of the plaintiffs' claim filed in the action consisted of items of actual expenses incurred by reason of the necessary repairs to their vessel, together with a claim for detention during the period of repair. All the items of the claim were stated in Chilean dollars, items 7 to 13 having been in fact paid in Chilean dollars, and item 14, having been incurred during the time lost in consequence of the repairs, was also stated in Chilean dollars. Items 1 to 5 were incurred in other currencies, and in the particulars were converted into Chilean dollars, and all the items of the claim except some small items of expenses in London were then converted into sterling at the rate of exchange prevailing at the date at which they were incurred by the plaintiffs. If the plaintiffs were right in principle in their contention that they were entitled to claim the sterling equivalent of their expenses at the rate of exchange prevailing when they incurred the loss by payment of those expenses,

C. A.
1933

THE BAARN.

Greer L.J.

the dates which they have taken for the purposes of making the conversion into English money would in all probability not be questioned. The defendants, however, said that during the progress of the action they had offered to pay to the plaintiffs the amount claimed in Chilean dollars, and they had paid that amount into a bank at Valparaiso into which they were authorized by the judge at Valparaiso to pay it, and under circumstances which under the law of Chile made it a payment to the plaintiffs to the same extent as it would have been if they had actually paid the money to the plaintiffs, and the plaintiffs had received the money but without any agreement to accept it in satisfaction. They relied on the affidavit of Mr. Pereira and the articles of the Code to which he referred as establishing their claim.

Paragraph 5 of Mr. Pereira's affidavit is in these words: "5. By order of the Court made on the 28th June, 1932, the said deposit was duly notified to the Compania Sud Americana de Vapores in accordance with article 1602 of the said Code. Such notification completed the procedure required by Chilean Law to effect a valid payment by 'consignation' from the Royal Dutch Line to the Compania Sud Americana de Vapores." He points out that there was an appeal by the plaintiffs against the order of the judge on the ground of want of jurisdiction. The order of the judge was confirmed on appeal, and in paragraph 7 of his affidavit the learned deponent says: "The said decision of the Court of Appeal is final and there is no further appeal, and the effect thereof is that the Court in Chile has finally decided that there was jurisdiction in the Court to make the orders referred to authorizing payment by 'consignation,' and that the Compania Sud Americana de Vapores has been duly paid in accordance with the Chilean Law." The defendants filed an affidavit in answer by Mr. H. J. Videla, who points out that the decision of the Chilean Court states that the deposit is without prejudice to any other rights of the plaintiffs, and that there is no decision by the Court that the amount is sufficient. He also pointed out that where the payment has not been declared enough by judgment of the Court, the debtor can withdraw the deposit. This affidavit does not dispute the proposition that the deposit when made is a payment. The payment does not cease to be a payment because it turns out that it is not enough; it still remains a payment though it turns out to be only a payment on account. Further, it does not seem to me to cease to be a payment because, if he chooses, the debtor making the payment may, if it is not accepted, undo the transaction and get his money back. I think it was established by the affidavits that under the law of Chile a payment by "consignation" is the equivalent of payment to the creditor.

In my judgment the result of the evidence as to the effect of the payment according to the Chilean law is that it is a payment to the Chilean company of the number of pesos paid into the Chilean bank, but the decision of the Chilean Court does not affect the question whether the payment is sufficient to extinguish or satisfy the debt, and it has no bearing on the question as to what value in sterling the English Court in which the action in rem is pending should attribute to the payment.

It was successfully argued before Langton J. that the payment so made was a payment in full of items numbered 7 to 14, and he ordered that the reference should be confined to the other items. The payment was in fact a payment in excess of the aggregate amount of pesos stated in the particulars of claim, and I do not myself understand why, if it was a good payment of items 7 to 14, it should not be deemed to be a good payment of the whole claim, because if the proceedings had been taken in Valparaiso, where the owners of the *Bio Bio* are domiciled, the liability for all the items would have had to be met by a payment in Chilean currency; but, be this as it may, the question we have to determine is whether a payment of this kind made on June 28, 1932, in Chilean currency can be credited to the defendants against their liability by striking out of the claim the items of damage incurred in Chilean currency at Valparaiso.

I have come to the conclusion that the learned judge's judgment ought to be reversed. There can be no doubt that a claim in an action for damages for collision is a claim for unliquidated damages, the different items being put forward as evidence in support of the amount that the Court is asked to award. The claim is not a claim for each item as a debt, but one for damages measured by the expenses and losses incurred by the owners of the ship by reason of the collision. I think the decision of the House of Lords in *The Volturno* (1) shows that the duty of the Court is to ascertain the damage suffered by the plaintiff, whether a foreign company or an English company, in sterling, and if the reference had been allowed to proceed the registrar would have had to ascertain the amount of the damages in sterling, and in doing so he would have been bound to convert the various currencies into sterling not at the date of his award but at the date when the expenses were incurred. It is conceded that if he did this he would have awarded a sum, which the judge in due course would have confirmed, in excess of the value of the Chilean currency paid in to the Valparaiso bank in the proceedings for payment by consignation. In my judgment, treating what has happened in Chile as a payment on account, it will be the duty of the registrar to credit that payment by its equivalent value in sterling at the rate of exchange prevailing on the date when the payment was finally approved by the Chilean judge. I do not think that a foreign debtor can get rid of the liability to pay damages awarded in sterling in an English Court by a payment of anything that is not in fact the equivalent of that which he is awarded by the English Court. Assuming for the sake of simplicity a claim is made in an English Court for damages for tort or breach of contract happening in France, say to the extent of 1000 francs, and the damages were incurred when the exchange was 25 francs to the £, a judgment in accordance with the decision in *The Volturno* (1) would necessarily be for 40*l*. Proof by the defendant that he had paid to the plaintiff in France

(1) [1921] 2 A. C. 544.

1000 francs at a time when they were depreciated and were only worth 8*l*., could not be regarded by an English Court as payment in full of the damages proved to have been sustained in accordance with the principles laid down by the House of Lords in *The Volturno.* (1) The defendants, however, relied upon the decision of the Court of Appeal in *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings.* (2) It is not, in my opinion, easy to reconcile this decision with the decision of the House of Lords in *The Volturno* (1), but however this may be, it is only a decision in relation to an action for debt, and in my judgment is not binding on this Court where the action is, as it was in *The Volturno* (1), an action for unliquidated damages. If damages consisting of expenses are to be taken at the exchange value at the time they were incurred, it seems to me a sum paid on account of these damages must be taken at its exchange value at the date of payment.

In my judgment the order of Langton J. should be reversed, and the reference to the registrar and merchants allowed to proceed as to the whole of the claim. The plaintiffs should have the costs of this appeal and of the summons before Langton J.

ROMER L.J. The case of the defendants on this appeal appears to me to involve the proposition that at the time they made the deposit of money in Chile they were indebted to the plaintiffs in the sum of 76,000 pesos or thereabouts. This, however, is a complete fallacy. There was no sum of pesos owing by the defendants to the plaintiffs at that or any other material time, nor have the plaintiffs ever claimed that there was. The position of the parties at the time of the issue of the writ in this action was as follows. The defendants had caused damage to the plaintiffs' vessel in circumstances that, according to English law, would appear to have constituted a tort on the defendants' part for which the plaintiffs were entitled to recover damages in the English Court of Admiralty. The liability of the defendants being

(1) [1921] 2 A. C. 544.

(2) [1922] 1 K. B. 451.

C. A.
1933

The Baarn.

Romer L.J.

established by decision of that Court or by the admission of the defendants, a reference to the registrar would normally be directed to determine the amount of the damage sustained by the plaintiffs, and that amount would, of course, be expressed in sterling. As a matter of fact the defendants did admit liability. But such admission could only amount in the circumstances to an admission of their liability under English law and of their liability to pay in sterling such a sum by way of damages as the registrar should determine.

Now the plaintiffs in their statement of claim had set out particulars of the damage alleged to have been sustained by them, and included in those particulars were certain sums of pesos said to have been expended by them in and about the repairing of their vessel at Valparaiso and another sum of pesos in respect of the detention of their vessel while the repairs were being effected, all such sums of pesos being translated into sterling as at the date when the repairs were effected. The particulars, however, mean no more than this, that the plaintiffs had sustained a loss of so many pounds sterling by reason of the fact that they had been obliged to expend pesos upon and in connection with the repairs, and had been deprived of the opportunity of earning pesos while the repairs were being effected. To ascertain how many pounds sterling had been thus lost, the pesos would be converted into sterling at the rate of exchange prevailing at the time that the pesos were paid or lost as the case may be.

This, in my opinion, is the effect of the decision of the House of Lords in *The Volturno.* (1) For the pesos would be regarded for this purpose merely as a commodity, and the damage sustained by the plaintiffs would be taken to be the value of that commodity in sterling at the time that the plaintiffs transferred it to the repairers, or were prevented from receiving it by reason of the vessel being laid up, as the case might be. This aspect of the matter is particularly dealt with in the speech of Lord Wrenbury. But the fact that the plaintiffs claimed to recover damages from the defendants because they had been compelled by the defendants to expend pesos, or had been prevented by the defendants from receiving pesos, in no sense amounted to a claim by the plaintiffs to be paid pesos by the defendants, nor did the defendants, when admitting liability in the action, thereby agree to pay, or admit liability to pay, pesos to the plaintiffs. Whether the defendants could have been successfully sued for damages in the Courts of any other country, I do not know. We have had no evidence on that question. Least of all have we had any evidence as to whether they could have been successfully sued in Chile.

---

(1) [1921] 2 A. C. 544, 562.

If they could, the plaintiffs would no doubt have asked for and obtained a judgment for damages expressed in pesos. But they did not. They elected to bring their action in this country, and I cannot understand how it can be supposed that the plaintiffs in this action sought to establish, or have by admission or otherwise established, the liability of the defendants under Chilean law to pay them anything whatsoever. But if they did not, how can the deposit made by the defendants in Chile of a sum of pesos, amounting at the present rate of exchange to very much less than the plaintiffs' claim to damages, have satisfied that claim? It is said on the part of the defendants that the claim has been satisfied by reason of certain articles of the Civil Code of Chile, of which translations were provided by Mr. Pereira, who made an affidavit on the defendants' behalf. It is, however, plain that those articles, and the additional article 1606, of which a translation has been provided by Mr. Videla, are dealing with cases where the relation of debtor and creditor prevails between the two parties to the transaction according to the law of Chile and can have no application to such a case as the present, where no such relation exists or is claimed to exist. Had the defendants' liability to pay the plaintiffs damages according to Chilean law been established by admission or otherwise, it is quite conceivable that the deposit made in Chile would have satisfied the plaintiffs' claim to damages in that country in respect of the matters to which I have referred, though even as to this there is no agreement between Mr. Pereira and Mr. Videla in view of

C. A.
1933

THE BAARN.

Romer L.J.

the provisions of article 1606. Had that been done, the question whether after such deposit the plaintiffs could have proceeded with their action in this country would have deserved serious consideration.

In the circumstances, however, the deposit has not, in my opinion, any effect at all upon the plaintiffs' claim in this action. It was contended on behalf of the defendants that this conclusion is inconsistent with the decision of this Court in what has been called the *Le Touquet* case. (1) But this is not so. In that case the defendant under a French contract was liable to pay to the plaintiffs in France a certain sum in francs. Default in payment having been made by the defendant, the plaintiffs sued her in the Courts of this country. While the action was pending, the defendant went over to France and there paid to the plaintiffs in francs the whole amount of the debt. It was held that the debt, being originally a French debt payable in France in French currency had not lost that character by reason of its being sued for in England, and that after the payment the plaintiffs accordingly were not entitled to recover anything more in the English action than nominal damages for non-payment at the due date, and certain costs, no interest being payable according to French law. The whole point of the case was that a sum in francs was payable in France under a French contract. It can have no relevance to the present case, where no sum in Chilean currency is due or even claimed by the plaintiffs as being due to them from the defendants.

In my opinion the appeal of the plaintiffs should be allowed with costs. The defendants' appeal was abandoned by them and must be dismissed.

Appeal allowed.

Solicitors for the appellants: *Ince, Roscoe, Wilson & Glover.*
Solicitors for the respondents: *Middleton, Lewis & Clarke.*

---

(1) [1922] 1 K. B. 451.

E. C. M. T.

THE LADY BELLE.

1933
July 27.

Shipping—Collision—Keeping Course and Speed—Duty of Stand-on Vessel to take Action—Warning Blasts to arouse Attention—Statements in Preliminary Acts as Evidence—Regulations for Preventing Collisions at Sea, 1910, *art.* 21 *and Note.*

Under the note to art. 21 of the Regulations for Preventing Collisions at Sea, 1910, when collision cannot be avoided by the action of the giving-way vessel alone, the vessel which has to keep her course and speed under the rules " shall take such action as will best aid to avert collision."

Two small steam vessels, the *M.* and the *L. B.*, on courses crossing so as to involve risk of collision, took no measures at all to keep clear of each other and came into collision. The *M.*, which had the *L. B.* on her own starboard side and consequently under art. 19 had to keep out of the way, admitted that she was partly to blame, but contended that the *L. B.*, on her own pleadings, was also to blame, as it was admitted that she merely kept her course and speed from first to last. The *L. B.* attempted to justify taking no measures under the note to art. 21 on the ground that up to the last moment the *M.* could have avoided the collision, and that in keeping her course and speed the *L. B.* was in fact taking the action which would best aid to avert collision :—

Held, that although the exact moment when the stand-on vessel must act under the note must not be unduly pressed against her, it would render the note nugatory to say that she can be excused from taking any action at all ; that at a very late stage the action of taking the way off the *L. B.* would have averted the collision, and that she also was to blame in the proportion of three-fourths to the *M.* and one-fourth to the *L. B.*

While it may be desirable in particular cases to sound a warning blast or blasts to attract the attention of a vessel which apparently is taking no steps to keep out of the way (and it would have been a wise precaution if the *L. B.* had done so), it is not the ordinary practice of seamen to sound whistle signals for which no provision is laid down in the Regulations, and accordingly it is not negligent to omit to sound the whistle in such circumstances.

The statements in a preliminary act are of high evidential value and can be used as admissions against the party making them.

Dictum of Fletcher Moulton L.J. in *The Seacombe* [1912] P. 21, 59 followed.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Mona*; the defendants were the owners of the steamship *Lady Belle*. The collision took place in the entrance to the Bristol Channel some ten to twelve miles to the southward and westward of the Smalls Light on the early morning of April 22, 1933.

The plaintiffs, pleaded case was that the *Mona* was making about 9 knots on a course of S. 71° E. magnetic when the masthead light and green sidelight of a vessel, which those on the *Mona* alleged was the *Lady Belle*, were observed distant about four miles and bearing about two points on the port bow of the *Mona*. The *Mona* kept her course and speed, and the other vessel was carefully watched and was seen to cross ahead of the *Mona* at a considerable distance, eventually opening her stern light broad on the starboard bow of the *Mona*. The *Mona* continued to keep her course and speed, but after an interval the *Lady Belle* was suddenly observed to have swung right round and to be approaching the *Mona* at speed, showing her masthead light and both sidelights close to on the starboard bow of the *Mona*. Thereafter, before any steps were or could be taken on board the *Mona* to avoid collision, the *Lady Belle*, with her stem, struck the starboard side of the *Mona* in the way of No. 1 hatch, causing damage to the *Mona*.

Before the case came into Court, however, it was realized that the vessel which crossed ahead of the *Mona* could not have been the *Lady Belle*, and on July 17 the plaintiffs' solicitors wrote to the defendants' solicitors that the plaintiffs were prepared to admit that the *Mona* was partly in fault and that they did not propose to call any evidence at the trial.

The defendants' pleaded case was that the *Lady Belle*, on a course of N. ½ E., was making about 7½ knots, when those on board her observed distant about four miles and bearing about four to five points on the port bow the two masthead lights of a steamship which proved to be the *Mona*. These lights were carefully watched, and as the *Mona* approached she opened her green light. The *Lady Belle* kept her course and speed, but the *Mona* continued on causing risk of collision and, although the *Lady Belle* continued to keep her course and speed as the best means of avoiding collision or minimizing its effect, the *Mona*, with her starboard side a little forward of midships, struck the stem of the *Lady Belle* a heavy blow, doing considerable damage.

In the preliminary act filed on behalf of the defendants, in answer to Para. XII., "What measures were taken, and when, to avoid the collision," the defendants stated that "the *Lady Belle* kept her course and speed."

Willmer for the plaintiffs. It is admitted on behalf of the plaintiffs that the *Mona* is partly to blame, and the plaintiffs accept and put in the statement in the defendants' preliminary act that the only measures taken by the *Lady Belle* were to keep her course and speed. That is a formal admission binding the party making it: see per Fletcher Moulton L.J. in *The Seacombe.* (1) The plaintiffs make out a prima facie case of negligence against the *Lady Belle* on that admission—although they will in addition put in the defendants' log—and it is for the defendants to rebut it; if they want a decision that the *Mona* is alone to blame they must prove it: see *The Cadeby.* (2)

R. F. Hayward for the defendants. The preliminary act of itself is not evidence against the defendants. In *The Seacombe* (1) the Court of Appeal took the unusual course of allowing additional evidence to be called, and the dictum of Fletcher Moulton L.J. is obiter. No prima facie case of negligence arises against the defendants on the case as it stands. The plaintiffs' pleadings are discredited and they have called no evidence; there is no evidence therefore on the most important factors—namely, the course and speed of the *Mona.*

[LANGTON J. I rule against you, Mr. Hayward, on the question of the statements in the preliminary act not being evidence, they are admissions.]

The defendants then called the navigating officer of the *Lady Belle,* whose evidence corroborated the case set out in their pleadings.

Willmer. This is a unique case. In no reported decision has the stand-on vessel come into Court and, as a compliance with the note to art. 21, attempted to justify as the best means of averting collision the taking of no steps whatever other than maintaining course and speed. As Gorell Barnes J. said in *The Ranza* (1), the stand-on ship must wait until the giving-way ship cannot by its own "action avoid collision," and then "he must act." No doubt, with two small vessels, the time for action would come late, but that is no excuse for not taking action at all; a very slight alteration of course or the stopping and reversing of the engines of the *Lady Belle* a few seconds before the collision would probably have enabled the vessels to pass clear of each other. Further, when it was apparent that those on the *Mona* were continuing on without taking any steps to keep out of the way, under the ordinary practice of seamen the *Lady Belle* should have sounded either a long warning blast or a succession of short toots, and it was negligence and a breach of art. 29 of the Regulations not to do so.

---

(1) [1912] P. 21, 59.

(2) [1909] P. 257.

[Reference was also made to *The Albano and The Parisian* (2); *The Otranto* (3) and *The Linkmoor*. (4)]

Hayward. The *Mona* is alone to blame; it is for the plaintiffs to prove negligence on the part of the *Lady Belle*, and they have failed to do so. The turning circle of the *Mona* was extremely small, and a touch of her helm at the last moment would have avoided the collision; if the *Lady Belle* had acted it might have resulted in a worse collision. In *The Dinorwic* (5), where the vessels were crossing at right angles, Bateson J. said that the stand-on vessel had a very difficult problem and (in effect) that whatever she did might be wrong, and in *The Hatchmere* (6) he absolved the stand-on vessel for porting instead of reversing in the endeavour to avoid a stem-on blow. The stand-on vessel must be allowed some latitude, and the *Lady Belle* had had no sort of indication from the *Mona* as to what she was doing or going to do. As regards sounding a warning blast, no provision for any such signal is laid down in the Regulations, and it is not the practice of seamen to sound unauthorized whistle signals.

(1) (1898) 79 L. J. (P.) 21.
(2) [1907] A. C. 193.
(3) [1931] A. C. 194, 200.
(4) (1929) 35 Ll. L. Rep. 225.
(5) (1928) 32 Ll. L. Rep. 295.
(6) (1925) 22 Ll. L. Rep. 153.

LANGTON J. This is an unusual case, and it has come before the Court in unusual circumstances. The plaintiffs' ship, the *Mona*, was the giving-way ship in a crossing case. The defendants' vessel, the *Lady Belle*, was the stand-on ship. The *Mona* was a vessel of no great size—654 tons gross and 186 feet in length—and the *Lady Belle* was smaller still—a vessel of 331 tons gross and 140 feet in length. The plaintiffs pleaded a somewhat elaborate story as their description of how this collision came to pass; the defendants pleaded an engagingly simple story. When the plaintiffs came to examine their position before the hearing they came to the conclusion that their case, as pleaded, could not be supported, and they therefore took the course of coming into Court without any evidence at all, relying upon certain admissions in the preliminary act of the defendants, and the logs of the defendants' vessel. That is not the way in which I like to try collision cases, and an argument arose as to whether the plaintiffs had in fact made out a prima facie case. Mr. Hayward contended that the statements in the preliminary act were not, in themselves, evidence. As to that I have no doubt that they are. I think, as Fletcher Moulton L.J. pointed out in *The Seacombe* (1), that such statements have the highest evidential value, are admissions, and can be rightly used by the other side as admissions against the parties making them. The point was not perhaps of great importance, because the same admissions are in the logs, and no one disputes for a moment that the logs are evidence.

Having said that I do not like trying collision cases in this way, it is only fair to the plaintiffs to say that I do not think, in this particular case, that their method of dealing with the matter has really either embarrassed the Court or made any difference to the parties, because the defendants, when they came to put forward their case, put into the witness-box a witness who gave most transparently truthful evidence, and left the question as to what were the real facts of the case beyond any possible doubt. But it is seldom that a single

(1) [1912] P. 21, 59.

witness from one side only can leave the Court in no doubt, and it is for that reason that I say that if it is desired that the Court should do justice between parties in this class of case it is highly desirable that at least one witness should be produced by each side to give the Court a real opportunity of examining and understanding the respective cases.

I will now deal with the facts. The *Mona* was the giving-way vessel, with the *Lady Belle* upon her starboard hand. It is not necessary to state the matter with more precision than that. I got no further precision from the plaintiffs themselves because, calling no witnesses, their admission was that the *Lady Belle* was at all material times substantially upon their starboard hand. The *Lady Belle's* second officer, Mr. Flynn, was called before me and gave the clearest evidence that the *Mona* was approaching her for a distance of something like four miles on a perfectly steady course on the port hand of the *Lady Belle*. In circumstances of that sort it is unique in my experience to hear from a perfectly credible witness, and the only witness called before me on either side, that neither vessel took any steps whatever to keep out of the way. That is the plain unvarnished truth that emerged from Mr. Flynn. Mr. Flynn said, not once, but over and over again, that he neither took steps, nor considered taking steps. It did not occur to him, he said, even to give blasts on the whistle to wake up the *Mona*. "I was depending on her," said Mr. Flynn, "to go under my stern," and he summed up the matter in two sentences: "I think there is no use in having a rule of the road if a man does not abide by it. I thought I had done the best thing I could, to keep my course and speed." Thus the matter is beyond all possible dispute, and the only question for the Court is "What is the responsibility of the *Lady Belle* in these circumstances, and if—as I think—there is some responsibility upon her, what is the degree of her culpability as compared with the culpability of the *Mona*?"

In fighting the case in this defensive fashion it occasionally happens that the fault of the person so defending becomes a little obscure. So much time is spent in examining the exact degree of the fault of the vessel which has claimed to be without fault that the one which has admitted fault is, perhaps, a little apt to get off lightly. Now on July 17 a letter was written by the plaintiffs' solicitors to the defendants' solicitors in these terms: "Please take note that we formally admit that the *Mona* is partly in fault for the collision, and that, in order to dispose of the case without incurring further expense, our clients would be prepared to settle on the terms of the *Mona* being two-thirds in fault and the *Lady Belle* one-third." They go on to say they do not intend to call any evidence at the trial. I am not for one moment questioning the propriety of that course. It has the merit of frankness, and has relieved the witnesses from the *Mona* from coming into Court to tell a story which could hardly be accurate, and therefore I have no word of criticism upon the course which has been adopted in this particular case.

I have now to turn to the question of the degree of blame. The offending of the *Mona* must not be in any way overlooked. It is glaring and it is high. Mr. Willmer stated it as being in effect a bad look-out. He argued that the Court must not allow itself to be led away by the eloquence of the other side in enumerating or tabulating the number of Regulations which have in fact been broken; they could be condensed, he said, into the simple phrase of bad look-out. I do not think it makes any difference whether one looks at it in the compendious phrase of bad look-out or in the expanded view of the various articles of the Collision Regulations which were undoubtedly broken in consequence of the bad look-out. The culpability is the same however it may be viewed. But it is a striking and useful illustration of the consequences of this particularly bad look-out that it should have resulted in a vessel which has the imperative duty of giving way doing nothing in discharge of that duty, and breaking at least two further Regulations as well. The *Mona* crossed ahead when she had a duty not to cross ahead; she did not put her engines astern or reduce her way when she had a duty to do that; so it is, I think, useful to expand that compendious phrase of bad look-out by examining what exactly are in this case the results of that bad look-out. For the *Mona* no shadow of excuse is offered. She saw nothing ; she did nothing—that is what I am to infer from the fact that she had no witnesses here—and she came into collision with a vessel as to whom she had the clear duty to give way and keep out of the way.

As regards the *Lady Belle* the position is very different. She is a very small ship and the *Mona* very little larger. The evidence from the *Lady Belle* is clear and has placed beyond question the fact that she also did exactly nothing towards avoiding this collision other than the observation of her first duty, which was to keep her course and speed and keeping—and I have borne this in mind—a good look-out in contradistinction to the bad look-out which was being kept on the *Mona*.

The whole matter really lies in the small compass of art. 21 and the note to art. 21. The duty on the *Lady Belle* of keeping her course and speed has been laid down in that article, and no Court has ever departed in any way from the standard that is set by these very simple words. In fact everything that I have ever read as falling from the Bench in this matter has only emphasized the importance of this duty. But the note puts upon her a second duty, and that is that when she finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

Now it is not surprising that that note has given rise to a vast amount of argument in a large number of cases. It is obvious that it is difficult to say with any precision what is the moment at which the stand-on vessel, having this imperative duty of keeping her course and speed, is to depart from her course and speed and take the best action to avert collision. It has been said, with great justice and propriety, that she is to be judged very leniently in this matter in fixing the moment at which, having one duty, she should depart from it to another. Obviously it would be most unfair to judge her too harshly by saying that she failed by a fraction of a second to judge correctly the point at which she should make this departure. It is much easier after the event to say with accuracy what is the right time, and one has to bear in mind that, for a variety of reasons, to a person on the bridge the point may seem very different, and certainly much more difficult. But, so far as I am aware, there is no case in which, without any extraneous circumstances to mitigate the fact, a stand-on vessel which in clear weather has done nothing at all to avoid a collision which she saw becoming more and more imminent, has been wholly excused. Indeed, to excuse her in those circumstances is to my mind to make nugatory the provisions of the note to art. 21. Lord Gorell, in *The Ranza* (1), in saying, as I have been saying to-day, that the second duty is not to be severely pressed, winds up his helpful and clear exposition of this matter in these words: "Therefore it resolves itself into this: that he must wait until the other ship cannot avoid the collision, and then he must act." That, I think, is the plain meaning of the note. He must do something. The duty of the stand-on ship is not to keep standing-on until she is actually in collision and say, "I obeyed art. 21." That is obeying art. 21 and disobeying the note. Mr. Flynn has come here, and with exemplary candour has not attempted to suggest that he did, or that he even considered doing, anything else. He has read art. 21 as if there were no note to it at all; as if there never was a duty upon a stand-on vessel, in any circumstances, to take any kind of action except that laid down by the first part of the rule. That puts it beyond dispute that the *Lady Belle* must bear some portion of the blame for the collision.

Mr. Willmer, arguing on behalf of the plaintiffs, urged upon me that one part of the offending of the *Lady Belle* was that she did not blow any form of warning signal—either a long blast or short toots such as we have often heard of in this Court as being blown to draw the attention of a vessel that is apparently neglecting her duty. I wish to say nothing at all against the propriety of so doing in a number of circumstances—and even in this case I think it would have been a wise thing to do for the *Lady Belle* to have blown a whistle signal

(1) 79 L. J. (P.) 21, 22.

at one period or another to try to awaken those on board the *Mona* to a proper sense of their duty. But at Mr. Willmer's invitation I have put the matter to the Elder Brethren, and I have asked them whether they feel that this is a case in which they would condemn the *Lady Belle* for not blowing a signal, either of a prolonged blast or a series of short blasts, and whether they would put it as high as Mr. Willmer wishes to put it, that it is unseamanlike not to do it. Mr. Willmer put it on the ground that it is the ordinary practice of seamen to do this. I have put all these matters to the Elder Brethren, and they do not agree with Mr. Willmer. They do not agree that it is the ordinary practice of seamen to blow either long blasts or short blasts, or toots, or any other form of blast to waken apparently sleeping souls upon the other vessel. In certain circumstances it may be a wise thing to do, and they agree with me, in the circumstances of this particular case, it certainly would not have been an unwise thing to do, but they tell me there are many seamen who hold strongly to the view that the blowing of a long blast in unauthorized circumstances is a most unwise thing to do. It cannot, therefore, be said that it is the ordinary practice of seamen to do anything such as that for which Mr. Willmer contended. Therefore I want it to be quite clear that I am not condemning the *Lady Belle* for any form of negligence in not blowing a signal which is not prescribed by any of the Regulations. What I am condemning her for is that she stood on into apparent, imminent, visible danger and did nothing at all to help to avoid it. Mr. Hayward satisfied me that the time at which the circumstances detailed in the note to art. 21 had arisen must have been very late, and Mr. Willmer, with his usual candour, did not attempt to dispute that clear fact. I think it would have come late. These were small vessels, and quite a small action on the part of the giving-way vessel at a comparatively late stage—comparatively when we think of ships of a larger size—would have avoided this collision. Equally, quite a small action—and particularly the action of taking off her way—on the part of the stand-on vessel, though coming at a late stage, would have had that effect. One cannot be blind to the fact that those on the *Lady Belle* had their eyes open to what was going on, whereas those on board the *Mona* had certainly not got their attention fixed upon what was happening; but the *Lady Belle*, with every opportunity of taking some action and every knowledge that some action was urgently required, did nothing at all.

Mr. Hayward argued that a vessel of this size cannot be blamed for not taking engine action in an emergency, because she has not got an engineer standing by to take that action. There must however be, on every vessel, some proper method of calling the engineer's attention, and, as Mr. Willmer pointed out, they had ample leisure in which to call the engineer's attention to the fact that some kind of action might soon be called for. In these circumstances the *Lady Belle* is clearly to blame. She is not to blame to anything like the degree the *Mona* is in fault, but she is definitely to blame and must pay her proportion of the damage, and the proportions at which I have arrived is the *Mona* three-fourths and the *Lady Belle* one-fourth. The defendants will have the costs down to July 17, when the offer of the *Mona* was made; no costs after that date.

Solicitors for the plaintiffs: *Thomas Cooper & Co.*
Solicitors for the defendants: *W. & W. Stocken.*

E. C. M. T.

1933
May 29,
30, 31;
June 1, 2, 20.

THE REHEARO.

Shipping—Damage in Dock—Ship Repairers—Railway Company's Dock—Custom of Port of Grimsby—Trawler floating on Bulkheads—Owners' Duty to watch during Repairs.

The plaintiffs' trawler was being repaired by the defendants, a firm of ship repairers, in No. 3 graving dock at Grimsby, a dock owned by the L. & N. E. Railway Company. When the dock filled with water (which happened once every twenty-four hours) the vessel had to float on her forward bulkhead. Owing to the unexplained presence of three rivet-holes in the bulkhead, water entered the vessel during the night and she sank, doing herself considerable damage.

The plaintiffs alleged that the duty of looking after vessels while in the dock undergoing repairs rested with the repairers. The defendants alleged that by custom the duty was on the owners. The owners in fact had a watchman on board, but he only noticed the trawler's change of trim shortly before she sank. On this issue the Court found that, although a more vigilant man might have noticed earlier what was happening and so have prevented much of the damage, the watchman was not in fact negligent:—

Held, that the defendants had established the existence of a local custom that while trawlers are undergoing repairs in the dock in question, the shipowner or his representatives, and not the repairers, undertake the duty of looking after the safety of the vessel and inspecting the bulkhead on which the vessel will have to float, and that accordingly the defendants were entitled to judgment.

DAMAGE IN DOCK.

The plaintiffs, G. F. Sleight and R. L. Humphrey, trustees of the late Sir George F. Sleight, as owners of the steam trawler *Rehearo*, claimed from John S. Doig (Grimsby), Ld., ship repairers, the amount of the damage sustained through the *Rehearo* falling over in one of the L. & N. E. Railway Company's docks at Grimsby when water was let into the dock while the trawler was being repaired. It appeared that in October, 1932, the *Rehearo* was lying in No. 3 graving dock, and in order to effect the repairs certain bow plates had been stripped off. Owing to the unsuspected and unexplained presence of three rivet-holes in the watertight bulkhead, on which the vessel had to float when every twenty-four hours the dock was filled with water, the *Rehearo* heeled over and sank.

The defendants had agreed to do the repairs to the *Rehearo* for 147*l*. 10*s*., and the plaintiffs alleged that the defendants negligently and/or in breach of the terms and/or the implied terms of the agreement failed to exercise reasonable and proper care and skill in and about the execution of the said repairs (inter alia) in that they failed to inspect the forward bulkhead of the *Rehearo* and ascertain that it was watertight, and failed to watch and/or cause any watch to be kept upon it whilst water was being admitted into the dock.

According to the defence, at the time the repairing agreement was entered into, it was well known to and understood by both parties that the trawler would have to be placed in one of the two graving docks at Grimsby belonging to the railway company, where every twenty-four hours water would, in accordance with the custom and practice obtaining at the dock, be let into the dock, and that, as the repairs would entail the removal of plates extending from the stem across the collision bulkhead, the trawler, as is usual and customary in such cases, would have to float upon her watertight bulkhead. The defendants further pleaded that " according to the custom and practice of the repairing of vessels in the dock, the owners of vessels remaining in the dock, while there is water therein, are responsible for the mooring and proper care and management of their vessels, and maintain a watchman on board for such purpose."

Somervell K.C. and *G. St. C. Pilcher* for the plaintiffs. The alleged custom has not been proved. It certainly is not universal, for the plaintiffs have never heard of it, and it is not even pleaded with precision. Merely a frequent practice is not sufficient to establish a custom : *Newall* v. *Royal Exchange Shipping Co.* (1) ; see also *Gripaios* v. *Kahl Wallis & Co.* (2) Apart from custom there is nothing in the repairing contract to throw on the plaintiffs the duty of watching and taking care of the vessel. The defendants were, it is submitted, bailees of the vessel, although the

---

(1) (1885) 33 W. R. 342 and 868. (2) (1928) 45 Times L. R. 161.

Rehearo was not in their dock: see *Ex parte Willoughby* (1) and *Earle's Shipbuilding and Engineering Co.* v. *Aktieselskabet D/S Gefion.* (2) But whether they were bailees or not, when skilled persons are instructed to do repairs to a vessel in dock, and in the course of the repairs the vessel is liable to a special danger, it is their duty to exercise all reasonable care whether the owners knew or ought to have known that during the progress of the work the vessel may be subjected to special danger. It was not the duty of the plaintiffs' watchman to inspect the lower part of the ship; he was on duty day and night to attend to the moorings and prevent pilfering.

[Reference was also made to *Travers & Sons Ld.* v. *Cooper.* (3)]

James Dickinson K.C. and *Cyril Miller* for the defendants. The evidence called by the defendants establishes that there is, as pleaded, a local custom that the inspection and watching of the bulkhead while a trawler is being repaired in the dock in question is done by the owners' or the underwriters' surveyor, and that the general responsibility for the safety of the vessel rests with the owners. The defendants were not in fact bailees of the vessel, although that question is really immaterial; the only question is, were the defendants negligent? They were entitled to rely on the fact that the vessel had recently undergone her Lloyd's survey.

[LANGTON J. That is no warranty that the bulkhead was sound; the surveyor might have blundered. If there be a duty on the defendants, they cannot rely on what some one else may or may not have done.]

There is nothing in the repairing contract to suggest that the duty of watching and inspecting rests on the repairers; the inference is the other way and supports the view that the owners remained in possession and had to look after their vessel. They owed that duty to themselves and if, as the undisputed facts suggest, their watchman was negligent, they cannot recover from the defendants the resulting damages. On the general duty to have an efficient watchman, see *Creterope* v. *N. E. Ry. Co.* (4) and *The Egyptian.* (5)

(1) (1881) 16 Ch. D. 604.
(2) (1922) 10 Ll. L. Rep. 305.
(3) [1915] 1 K. B. 73.
(4) (1921) 9 Ll. L. Rep. 450, 453.
(5) [1910] P. 38; [1910] A. C. 400.

LANGTON J. The plaintiffs, the owners of the trawler *Rehearo*, sue the defendants, J. S. Doig (Grimsby), Ld., who are repairers, for damage sustained to the *Rehearo* whilst lying in No. 3 graving dock at Grimsby. The case is an unusual one, and not without a good deal of difficulty. It has been excellently argued on both sides, and notwithstanding the difficulty I have felt about it I think it is better I should give judgment now while all the points are present to my mind.

The *Rehearo* had suffered some damage to her forward plates, and it became necessary to have this damage repaired. The defendants undertook the repair after a tender, the contract being contained in certain letters.

The facts are that the *Rehearo* was put into No. 3 graving dock, a public dock owned by the London and North Eastern Railway Company, and let to the public at certain rates of hire. She occupied the dock in common with five other trawlers also under repair. The *Rehearo* was put into the dock at the instance of the plaintiffs and the first dock dues were to be paid by the plaintiffs; subsequent dock dues were to be paid by the defendants. On October 29, 1932, which was a Saturday, the defendants' workmen left the *Rehearo* at noon, and the condition in which they left her was that certain of her bow plates had been removed and she was exposed to the necessity of floating on her forward bulkhead when the dock was filled with water. This bulkhead extends the full height of the vessel, and it is not denied that it is quite customary during repairs to float vessels of this class upon that bulkhead. As the case first presented itself to me I saw it in this way. The repairers had taken off the bow plate. They had exposed this forward bulkhead—an unusual surface when judged generally—to the action of the water, and therefore one would imagine some duty lay upon them to examine the bulkhead in question.

On the Saturday afternoon the dock was filled with water. The defendants' workmen had departed, and there was in charge of the *Rehearo* only one man, a watchman, in the employment of the plaintiffs. By an extraordinary mischance, which is quite unexplained in any evidence before me, the bulkhead had three small rivet-holes in its face whereby water was able to and did in fact enter. So far as can be judged by the appearance of these holes they had originally held in position some bar or piece of metal; one can see that there are bars of this character in other portions of the bulkhead, but no one has attempted to explain how it came to pass that the holes were in existence at this time. The vessel was classed at Lloyd's and she had undergone a special survey within some three years of the occurrence. It is inexplicable that she should have had these rivet-holes in the bulkhead at the time, and there is evidence that she had been exposed to some test since then which would have made it quite impossible that the holes could have been in existence at the time she passed her survey. The holes being there and the surface being exposed to water, the water entered through the bulkhead, and the vessel which had been listed to the quay with her starboard side made fast by ropes to the quay, lost her list, fell over to port, and in a very short time sank by reason of water entering the engine room aft over the deck, and thereby sustained very considerable damage.

Who is responsible for this damage? The plaintiffs plead that it was an implied term that the defendants should safely keep the *Rehearo* during the execution of the repairs, and obviously she was not so kept, because she was damaged, and they lay their case in negligence and in breach of the implied term of this agreement and they say that the repairers are liable. The defendants' case is twofold. They say: "No, by the terms of this agreement we had no duty at all to look after this vessel while she was in this dock. Furthermore, we say there was a custom of the port of Grimsby that, at least so far as this dock was concerned and so far as the repair of trawlers is concerned, the duty of looking after the vessels while they are in this dock lies with the owners of the vessels, and any duty there may be of watching the bulkhead when vessels are floated on the bulkhead lies also on the owners of the vessel." Further, the defendants say: "The vessel was in charge of your watchman. Your duty is to have a watchman who is able to deal with the ordinary and usual occurrences on

1933

THE REHEARO.

Langton J.

board a vessel, and your watchman failed in his duty in that he perceived nothing at all till five or six o'clock in the morning when the vessel had lost her list and was very soon about to sink.'' The defence struck me as somewhat unusual. It is not at all readily that one comes to a conclusion in favour of a custom of this character, but I cannot ignore the evidence if sufficiently strong in character to show that the common law is varied by local custom.

First, one must look to see whether any light can be obtained from the terms of the contract. They are not at all illuminating. It would be perfectly possible to imply from that contract either that the owner or the repairer had custody and possession of this vessel during the repair to be carried out under the contract. But the parties have come forward and given me almost a superabundance of evidence on this point, and the clear conclusion at which I have arrived after a full discussion of the case is that there was no surrender by the owners of the *Rehearo* to the repairers for the purpose of repair. One is apt to be misled by thinking of a case in which the repair is in a private dock. In that case there cannot be a shadow of doubt that the custody and possession of the vessel during the repair are in the hands of the repairer, and I hope that nothing that I say in this case will minimize in any way the plain duty which lies on repairers in such cases to exercise proper care of the chattel in their possession. But in this case the evidence was strongly the other way. We endeavoured in argument to test the matter by cases dealing with possessory lien. These cases afforded some assistance, and so far as they go I think they favoured the plaintiffs. They were *Ex parte Willoughby* (1) and *Earle's Shipbuilding and Engineering Co.* v. *Aktieselskabet D/S Gefion.* (2) But in those cases the possessory lien was found in favour of the repairer. The accommodation had been arranged for and paid for by the repairer, and the ship had been entered in the books of the public dock in the repairer's name. In this case the procedure was otherwise, and I am particularly impressed by the fact that every one on the part of the

(1) 16 Ch. D. 604.

(2) 10 Ll. L. Rep. 305.

repairers had left the vessel quite openly by noon on Saturday. There is no suggestion that any one was expected to remain, and no question seems to have been raised about it at the time. Mr. Doig went into the witness-box and gave me most excellent evidence of the circumstances surrounding the contract. He impressed me as a most candid and painstaking witness. He struck me as a man who was giving to the very best of his knowledge and belief a true account of what happened in this case. Against that the plaintiffs were people who also had had very great experience. They had had in the course of quite a short time over 600 cases of repair, and they were quite unaware, as they said, of any custom such as was put forward on behalf of the defendants. But Mr. Doig's evidence particularly impressed me in that he said he believed that some one ought at least to inspect the bulkhead, and indeed, in his experience it always was inspected. But so far as he was concerned it never crossed his mind to inspect some one else's bulkhead at all, and it seemed clear to me that Mr. Doig was stating nothing more than the truth in saying that, so far as he was concerned, he occasionally had a contract in which the responsibility was in express terms put upon his shoulders, and in those cases he did inspect the bulkhead if he had any intention to float the vessel upon the bulkhead, but where there was no such special term he never had taken this view at all. It never occurred to him that he should inspect the bulkhead for which, as he put it, he was in no way responsible. That is the evidence of one man only. But, quite apart from the question of custom, I think it is very useful evidence, if one accepts it as I do, to show what is the state of business between these parties. Mr. Doig's view of the business between the parties was : " I was merely the man who was hired to come upon this ship and do the exact job I had contracted to do. What the owners did with their ship in the meantime and how they looked after it had nothing to do with me. The ship was not bailed to me in any sense. I was not responsible for her in any way. I was responsible only for the work I had to do."

1933

THE REHEARO.

Langton J.

If that be the right view of the contract between the parties, quite apart from the question of custom, it would be difficult to say that the repairers were to blame for the damage which had occurred through a failure either to inspect or watch the bulkhead which admitted the water. If they were in truth and in fact nothing more than repairers who were invited on the premises, over which they had no control, I see great difficulty in putting upon them any responsibility. That is the first and, I think, the strongest ground of defence. To my mind it is quite an unusual position, but I believe it to be the actual position in this case. I think the facts I have stated all go to show that this was the real agreement. Therefore I do not imply an agreement such as is pleaded in the statement of claim, and which would be in normal circumstances a proper inference, that the repairers should safely keep the vessel during the execution of the repairs. That is the first aspect of the case.

The main case pleaded, and on which evidence was heard at great length, is the alleged custom that at this particular dock, with this particular class of vessel, the owners' representative or some one acting on behalf of the owners shall inspect the bulkhead, and, if necessary and the owners desire it, watch the bulkhead during the material time. I watched the evidence on behalf of that custom very carefully, and I paid great attention to Mr. Somervell's analysis of it, in which he pointed out that the cases to which the witnesses were able to speak in fact were not very numerous. No one was able to speak to more than four or five cases in which they had known vessels floated on their bulkheads in this manner. But against that there was evidence of people, repairers and insurance surveyors, who had acted as owners' surveyors, and these people spoke to a custom whereby either the owners' representative or the insurance surveyor was the person to whom the duty was entrusted of inspecting the bulkhead and making sure that it was ready to stand the strain to be imposed upon it in the dock. Mr. Somervell made another excellent point that the whole matter is obscured by the introduction of insurance surveyors

1933

THE REHEARO.

Langton J.

into this class of case, and Mr. Dickinson at one time put forward an argument that the repairer was entitled to rely upon the fact that the vessel was a classed vessel and had been passed as having watertight bulkheads by the insurance surveyor. That argument of Mr. Dickinson did not commend itself to me. The repairer has to take care or he has not. If he has a duty to take care, I cannot see how he could be excused from that duty by saying: "I believed some one else was taking care." Mr. Somervell's point threw rather a fresh light upon the matter, because it may well be, if there be this custom, that it has grown up by reason of the more prominent part which insurance surveyors take nowadays than they used to take when the business of insurance was much less developed. It seems to me a quite possible theory for the origin of this custom that, in view of the fact that insurance surveyors always as a matter of practice inspect these bulkheads before repairs are carried out, neither the owners nor the repairers thought there was any duty lying upon them. From that may have developed the practice that the repairer says to himself: "This is not an expense for which I need budget at all, because it is a matter which is carried out either by the insurance surveyor or some one else." I thoroughly agree that the mere fact that laxity had crept in, and that the repairer had chosen to rely upon the insurance surveyor, would not be any reason for holding that any custom such as is pleaded here was established. But I do not think I am much concerned in endeavouring to discover what was the origin of the custom. However it may have originated, I am of opinion that so far as this dock is concerned and this class of vessel is concerned, and I expressly limit it to that because I have had no real evidence that the custom exists apart from that, there is a custom of the character pleaded in the defence. I think that there is a custom, so far as these small vessels are concerned, that the owner or insurance surveyor, acting for that purpose as a friend or agent of the owner, does undertake the duty of either assuring himself before water is admitted to the dock that the bulkhead is able to stand the strain, or, if that is not done, is present at the actual incursion of the water to satisfy himself there and then that the bulkhead is standing the strain. I do not think that excludes the possibility that if the owner is a careful man he sees that both are done. However that may be, I accept the evidence of the various people who have been called to assure me that whatever may have been in the remote past the duty of the repairer in Grimsby in this respect, it is not a duty which rests upon him to-day in the absence of those express terms contained in some of Mr. Doig's contracts.

I should not omit to notice that in contradiction of the evidence of the numerous people who have been called for the defendants there was one strong witness called on behalf of the plaintiffs. They called a Mr. Oldham, who had an almost unique experience in the matter of employment by various firms, for he had been in the employment of such well known people as Workman, Clark & Co., Cammell Laird, and others, and was in a responsible position in the employment of those firms. But Mr. Oldham was speaking, as I understood his evidence, quite generally, when he said that repairers took the elementary precaution of seeing that a bulkhead was doing its duty, and I cannot help thinking that to-day in the vast majority of cases in the contracts of which one ordinarily hears, and certainly in all contracts in which the custody and possession of vessels is handed over to repairers, this duty is undertaken by the repairers. But Mr. Oldham did not purport to speak as a Grimsby man or to deal with any special incidents of the Grimsby dock. Otherwise was the evidence of Mr. Powell. He was an old and tried repairer of Grimsby, and engaged for over fifty years in shipbuilding. He said he was quite familiar with floating ships on their bulkheads, and beyond a doubt in every case he used to instruct his foreman boiler-maker to make a thorough examination of the bulkhead. His evidence was, therefore, in strong contrast to all the evidence called on behalf of the defendants. One boiler foreman who was in his employment was called by the defendants, a Mr. Blakey. He really did little to shake the evidence of Mr. Powell, because he said out of five cases in which he floated vessels on their bulkheads he, while in Mr. Powell's employment, had had orders from Mr. Powell to inspect the bulkhead. But he qualified that by saying that the orders were express orders to do it for the owner. I do not think I should take the evidence of Mr. Blakey against that of Mr. Powell if I thought there was any strong conflict between them. I think Mr. Powell had always taken this precaution which he says he took, and it may well be that this custom, spoken to so strongly by all the witnesses for the defendants, was a custom which has grown up without touching Mr. Powell's procedure in the matter and of which he may personally either be completely ignorant or wish to ignore. As I understood his evidence he was ignorant of it, and I am mindful of the fact that to establish a custom one must be satisfied that it is universal and that it is known. But I do not think I should be justified on Mr. Powell's evidence, against the very considerable weight on the other side, in saying that a custom is negatived merely because Mr. Powell, who is a very old man, did not agree with it or know of it. I have weighed his evidence against the rest of the evidence, and weighing it I think the defendants succeed upon the defence.

There is one other matter on which a certain amount of time has been expended, again a not altogether easy point. That is, that even supposing the defendants were responsible for the incursion of water through the bulkhead, the large majority of this damage would never have occurred had it not been for the negligence of the plaintiffs in not themselves taking proper care of the vessel while in the dock. Quite shortly, the facts in that connection are that the water was let into the dock commencing in the early part of the afternoon of Saturday, October 29. A watchman was on board while this water was being let in. The dock was full about 6.30 P.M. in the evening, and the watchman discovered nothing as to the condition of the vessel until after 5 A.M. on the morning of the 30th. The watchman is a former master of some thirty years' experience, and it does not look, upon these facts, as if he can have been exercising a very vigilant outlook on the vessel to have noticed nothing before that time, since, shortly after the time he noticed she had lost her list, the vessel foundered. But I do not think that concludes the matter at all. Mr. Dickinson cited two cases to me upon this rather difficult question of the duty of a shipowner to exercise proper care of his vessel while in dock. He cited *Creterope* v. *N. E. Ry. Co.* (1), decided by Hill J. in this Court and affirmed by the Court of Appeal. In that case the vessel was a concrete tug and was holed by a bolt whilst lying in dock in Hull. It was proved that there was no one on board at the time. Hill J., with the assistance of the Elder Brethren, took the view that it was negligence on the part of the tug owner to leave the vessel with no one on board, and I do not suppose that any one could be astonished at the Court arriving at that view. But that is not this case, because here there was a man on board, and therefore the facts are not so simple. It is not quite easy to state what is the duty of a shipowner in these circumstances. Perhaps one gets some light from the other case which Mr. Dickinson cited, *The Egyptian* (2), in which the watchman in charge of one trawler undertook to bring another trawler into the same dock where his owners' vessel was lying and in so doing damaged the owners' vessel, made no examination of the damage done, and the trawler sank. The circumstances are not at all parallel. Lord Shaw says there in his speech: "The defendants are liable for the damage which is the natural and direct consequence of their wrongful act: that would cover the slight injury to which I have alluded. The second principle is that the defendants are not liable for any further damage which could have been avoided or minimized by the exercise of reasonable care on the part of the plaintiffs."

If I am right in the conclusion I have arrived at concerning the incidence of the duty in this case of looking after the trawler, it was a duty which lay upon the plaintiffs. But I have to remember she was a trawler in a trawler dock, and that the purpose of a watchman as declared by the plaintiffs was that they should have some one on board able to do the small amount necessary to tend the ropes and protect the vessel against theft. That, in the circumstances, they considered sufficient. Seeing how these vessels lie in the dock and looking at the circumstances generally, I do not think that I ought to put any higher duty upon them than that. I do not think they have any duty to have upon the vessel a person of any high degree of skill even though in this particular case they happened to have a master mariner in charge. It is a striking comment that a master mariner should not during all these hours have noticed that the vessel had altered her trim to the extent to which this vessel must have done, but that seems to me to be an accident rather than the substance of the matter. I do not think that they were bound to have a person on board who could and ought to have taken such care and have such knowledge as to be immediately aware of the fact that the vessel was changing her trim and was thereby in danger. Mr. Dickinson laid great stress upon that point and called certain witnesses to show that the ropes of this vessel were not properly tended. I think the way in which these ropes were made fast left quite sufficient play to deal with the ordinary variations which would occur during the time the dock filled and emptied, if there was some one there to tend them. The watchman's evidence was that he made periodical rounds during the night, and, notwithstanding that and the fact that the vessel must have been going down quite steadily by the head during the whole night, he never perceived there was any variation of trim. I think Mr. Dickinson is on strong ground when he says: "I don't think much of that watchman." I think the watchman is probably exaggerating when he says he made so many periodical rounds and inspections; but I have to bear in mind that he was not a mere night-watchman but a man who had to keep his watch both day and night; and I am not prepared to say, taking him not as a master mariner but as an individual who was there to look after what was necessary, and nothing more, for this ship in ordinary circumstances, that he was lacking in the performance of his duties. No one imagined for a moment that this bulkhead was going to give way by leaking water. In fact in the experience of all the highly qualified people who have come here to give evidence in this case no one seems to know of a case in which a bulkhead has given way. It was a wholly exceptional circumstance. The sinking was of a gradual character which took place during the night, and though a more vigilant man might have perceived that the vessel was altering her trim, I do not think I ought to say that a watchman, such as it is incumbent upon the plaintiffs to have upon their vessel, was lacking in his plain duty in failing to perceive in these circumstances a fact which in broad daylight would have been staring him in the face.

---

(1) 8 Ll. L. Rep. 320; 9 Ll. L. Rep. 450.

(2) [1910] A. C. 400, 402.

Therefore, on this second defence I am against the defendants. But upon the two grounds that the contract did not put the vessel in any way into the hands of the defendants or impose upon them any special duty to take care, and upon the ground of custom, I find in their favour. The claim therefore fails and there must be judgment for the defendants.

Solicitors for the plaintiffs: *Pritchard & Sons, for H. K. & H. S. Bloomer, Grimsby.*

Solicitors for the defendants: *Ince, Roscoe, Wilson & Glover, for A. M. Jackson & Co., Hull.*

E. C. M. T.

END OF VOL. AND OF PROBATE SERIES FOR 1933.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 2, 1933, will be as follows :—

In the First Series,
[1933] Ch.

In the Second Series,
[1933] 1 K. B. [1933] 2 K. B. [1933] P.

In the Third Series,
[1933] A. C.

INDEX.

ABATEMENT OF ACTION—Death of respondent husband before trial—Wife's costs - - - - - 39
See DIVORCE **7.**

ACTION IN REM—Damage to grain elevator barge - - - - - 224
See SHIPPING **10.**

ADULTERY—Admission of, in petition—Sealed particulars—Access refused to wife - - - - 218
See DIVORCE **8.**

AGENCY—Sub-contractors and independent contractors—Damage to cargo 154
See SHIPPING **9.**

AGENTS—Service of writ on—Tests of carrying on business within the jurisdiction - - - - 56
See SHIPPING **12.**

ALIMONY—Judicial separation—Permanent maintenance — Principles distinguished - - - - - 95
See DIVORCE **3.**

" APPURTENANCES "—Mortgage of fishing vessels—Nets - - - 109
See SHIPPING **11.**

ASSIGNMENT OF FREIGHT—Sufficiency of notice—Priorities - - - 87
See SHIPPING **1.**

BANK OF IRELAND—Executor under Act of Irish Free State—English assets
See PROBATE **1.** 184

BELGIAN CODE DE COMMERCE—Hague Rules—Consignments to Guatemala from Antwerp - - - 119
See SHIPPING **2.**

BILL OF LADING—Conflict of laws—Hague Rules—Belgian Code de Commerce
See SHIPPING **2.** 119

BURDEN OF PROOF—Prima facie negligence—Cause of accident left in doubt 154
See SHIPPING **9.**

CARGO.
See SHIPPING **2, 9.**

CASES :—

—— *Baarn (The)* (1932) 49 Times L. R. 132
Reversed. THE BAARN - 251

—— *Beaumont* v. *Beaumont* [1932] P. 158.
Reversed. BEAUMONT *v.* BEAUMONT - - - - - 39

—— *Benyon* v. *Benyon* (1890) 15 P. D. 29, 54.
Distinguished. NEWTE *v.* NEWTE AND KEEN - - - - 117

—— *Coleman* v. *Coleman* [1920] P. 71, 74.
Dicta of the President in, approved and followed. BEAUMONT *v.* BEAUMONT - - - - 39

—— *Cunningham* v. *Cunningham* (1897) 77 L. T. 405.
Approved and followed. BEAUMONT *v.* BEAUMONT - - - 39

CASES—*continued.*

—— *Gladstone* v. *Gladstone* (1876) 1 P. D. 442.
Distinguished. Newte *v.* Newte and Keen - - - - 117

—— *Hall* v. *Hall* (1864) 3 Sw. & Tr. 390.
Approved and followed. Beaumont *v.* Beaumont - - - - 39

—— *Maconochie* v. *Maconochie* [1916] P. 326, 328.
Dicta of Shearman J. in, approved and followed. Beaumont *v.* Beaumont - - - - 39

—— *Okura & Co.* v. *Forsbacka Jernverks A/B* [1914] 1 K. B. 715.
Tests stated by Buckley L.J. in, applied. The Lalandia - 56

—— *Palmer* v. *Palmer* [1914] P. 116.
Discussed. Mason *v.* Mason and Cottrell - - - - 199

—— *Restall* v. *Restall* [1930] P. 189.
Rule laid down in, extended. Mould *v.* Mould - - - 76

—— *Seacombe* (*The*) [1912] P. 21, 59.
Dictum of Fletcher Moulton L.J. in, followed. The Lady Belle 275

—— *Société des Hôtels Le Touquet Paris-Plage* v. *Cummings* [1922] 1 K. B. 451.
Considered and distinguished. The Baarn - - - - - 251

—— *Thames and Mersey Marine Insurance Co.* v. *Societa di Navigazione a Vapore del Lloyd-Austriaco* (1914) 12 Asp. M. L. C. 491.
Tests stated by Buckley L.J. in, applied. The Lalandia - 56

—— *Torni* (*The*) [1932] P. 27 and 78.
Distinguished. The St. Joseph 119

—— *Waller* v. *Waller* [1927] P. 154.
Overruled. Natborny *v.* Natborny - - - - - 1

—— *Zigurds* (*The*) [1932] P. 113, 129.
Reversed on one point. The Zigurds - - - - 87

CHARGING ORDER—Solicitors' costs—Probate action—Intestacy—Property recovered - - - - 105
See Probate **2.**

CHILDREN — Interests of — Reduction of power of settlement on second marriage of guilty wife - 143
See Divorce **11.**

CHILE—Payment of collision damages in—Validity - - - - 251
See Shipping **3.**

CHURCHYARD—White marble memorial in —Faculty - - - - 150
See Ecclesiastical Law.

COLLISION.
See Shipping **3, 4, 5, 6, 7.**

CONFLICT OF LAWS—Hague Rules—Belgian Code de Commerce—Shipment to Guatemala from Antwerp
See Shipping **2.** 119

CONTRACTORS, INDEPENDENT—Authorization for exemption from liability for negligence - - - 154
See Shipping **9.**

COSTS — Payment of wife's — Death of husband before trial - - 39
See Divorce **7.**

—— Set-off by husband of costs ordered to be paid by wife to intervener - 199
See Divorce **9.**

CRUELTY—Acts of, more than six months before complaint or information 17
See Divorce **2.**

CUSTOM—Port of Grimsby—Vessels repairing in railway dock—Duty to watch
See Shipping **8.** 286

DAMAGE TO CARGO.
See Shipping **2, 9.**

DEATH—Abatement of divorce suit by reason of—Wife's costs - - 39
See Divorce **7.**

DEMURRAGE—Interest on estimated sum for, which will be incurred in futuro - - - - - 136
See Shipping **4.**

DERRICK—Damage by, to grain elevator barge—Jurisdiction in rem - 224
See Shipping **10.**

DISCLOSURE — Sealed particulars of admitted adultery - - 218
See Divorce **8.**

DISCRETION—To refuse access to wife of husband's particulars of admitted adultery - - - - 218
See Divorce **8.**

DIVORCE — *Domicil — Intention to acquire Domicil of Choice—Evidence—Declarations of Intention— Admissibility of Declarations by Party claiming acquisition of Domicil.*
Bryce *v.* Bryce - **Lord Merrivale, Pres. 83**

2. —— *Husband and Wife — Persistent Cruelty— Acts of Cruelty more than Six Months before Complaint or Information—Course of Conduct—Summary Jurisdiction*

DIVORCE—*continued.*

(Separation and Maintenance) Acts, 1895 (58 & 59 *Vict. c.* 39), *ss.* 4, 8, *to* 1925 (15 & 16 *Geo.* 5, *c.* 51)—*Summary Jurisdiction Act,* 1848 (11 & 12 *Vict. c.* 43), *s.* 11.
Donkin *v.* Donkin - - **Div. Ct. 17**

3. —— *Maintenance—Principles of Awards of Permanent Maintenance—Alimony in Judicial Separation distinguished—Statutory Discretion of the Court—Matrimonial Causes Act,* 1857 (20 & 21 *Vict. c.* 85), *s.* 32—*Matrimonial Causes Act,* 1866 (29 & 30 *Vict. c.* 32), *s.* 1—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-ss.* 1, 2.
Horniman *v.* Horniman
Lord Merrivale, Pres. 95

4. —— *Nullity—Impotence—Inspection of the Person—Dispensing Power of the Court—Law and Practice with reference to Inspection reviewed.*
Intract *v.* Intract (*Otherwise* Jacobs)
Langton J. 190

5. —— *Order for Separation and Maintenance of Wife—Discharge on Ground of her Adultery—Fresh Evidence—Limitation of Time for Application for Discharge—Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 *Vict. c.* 39), *ss.* 7, 8—*Summary Jurisdiction Act,* 1848 (11 & 12 *Vict. c.* 43), *ss.* 1, 11.
Natborny *v.* Natborny - - **C. A. 1**

6. —— *Permanent Maintenance—"Conduct of the Parties"—Undefended Suit for Divorce—Conduct not Pleaded in Answer to Petition—Evidence on Inquiry as to Permanent Maintenance—Estoppel—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-s.* 1—*Matrimonial Causes Rules,* 1924, *r.* 69.
Mould *v.* Mould - - **Bateson J. 76**

7. —— *Practice — Abatement of Suit — Wife's Costs—Security—Death of Husband before Trial—Jurisdiction to order Taxation and Payment of Wife's Costs out of Fund in Court.*
Beaumont *v.* Beaumont - **C. A. 39**

8. —— —— *Petition by Husband — Admission of Adultery in Petition—Particulars—Direction by Court that Statement of Particulars should be enclosed in Sealed Envelope and lodged in Court—Refusal of Access to Wife—Discretion of Court—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 178.
Cullen *v.* Cullen - - - **C. A. 218**

9. —— —— *Wife's Costs — Intervener — Set-off by Husband against Wife's Costs of Costs ordered to be paid by Wife to Intervener and assigned by Intervener to Husband—Wife's Costs ordered to be Paid to Wife's Solicitors — Lien of Wife's Solicitors — Garnishee Order on Bank Balance of Husband —R. S. C., Order* xlv., *r.* 1 ; *Order* lxv., *r.* 14 —*Solicitors Act,* 1932 (22 & 23 *Geo.* 5, *c.* 37), *s.* 69.
Mason *v.* Mason and Cottrell **C. A. 199**

10. —— *Settlement—Power to alter Order for Variation of Settlement.*
Newte *v.* Newte and Keen
Langton J. 117

11. —— *Variation of Settlement—Interest of Children—Power of both Spouses to resettle on subsequent Marriage—Preservation of the Power of Resettlement of Innocent Spouse—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192.
Colclough *v.* Colclough and Fisher
Langton J. 143

DOCK—Trawlers repairing in—Custom of Port of Grimsby - - - **286**
See Shipping **8.**

DOMICIL—Admission of declarations by party claiming acquisition of domicil
See Divorce **1.** **83**

ECCLESIASTICAL LAW—*Faculty—Erection of White Marble Memorial in Churchyard.*
In re Little Gaddesden Churchyard. *Ex parte* Cuthbertson
Arches Court of Canterbury 150

ELEVATOR BARGE—Damage to—Steamship's defective derrick—Jurisdiction in rem - - - - **224**
See Shipping **10.**

"END ON" RULE—Alteration in course due to yawing - - - - **234**
See Shipping **7.**

ESTOPPEL—Maintenance—Failure to plead matters affording defence to original petition for dissolution - - **76**
See Divorce **6.**

EVIDENCE—Declarations by party claiming acquisition of domicil - - **83**
See Divorce **1.**

—— Statements in preliminary acts - **275**
See Shipping **5.**

EXCHANGE VALUE—Fall in—Validity of payment in foreign currency - **251**
See Shipping **3.**

EXECUTOR—Bank of Ireland as—Irish Free State authorization - **184**
See Probate **1.**

FACULTY—Marble memorial in churchyard *See* Ecclesiastical Law. 150

FISHING VESSELS—"Appurtenances" of—Drift nets—Mortgage - 109
See Shipping **11.**

FIUME — Status of — "Nationals of the former Kingdom of Hungary" 22
See Prize Court.

FOREIGN CORPORATION—Service of writ—Tests of carrying on business within the jurisdiction - - 56
See Shipping **12.**

FOREIGN CURRENCY—Payment of collision damages in—Validity - 251
See Shipping **3.**

FREIGHT—Assignment of—Sufficiency of notice—Priorities - - - 87
See Shipping **1.**

GARNISHEE ORDER—Set-off by husband of intervener's costs against wife's costs - - - - - 199
See Divorce **9.**

GRIMSBY—Custom of port—Trawlers repairing in railway company's dock—Duty to watch - - - 286
See Shipping **8.**

GUATEMALA—Shipment to, from Antwerp on Norwegian ship—Belgian Code de Commerce - - - 119
See Shipping **2.**

HAGUE RULES—Belgian Code de Commerce—Conflict of laws - - - 119
See Shipping **2.**

HUNGARY—Effect of Treaty of Trianon on Fiume - - - - - 22
See Prize Court.

HUSBAND AND WIFE.
See Divorce.

IMPOTENCE—Dispensing power with regard to inspection - - - - 190
See Divorce **4.**

INSPECTION OF THE PERSON—Impotency—Dispensing power - - 190
See Divorce **4.**

INTEREST—On damages which will be incurred in futuro - - 136
See Shipping **4.**

INTERNATIONAL LAW—Status of Fiume under Treaty of Trianon - 22
See Prize Court.

INTERVENER—Costs of—Set off against wife's costs - - - - 199
See Divorce **9.**

INTESTACY—Probate action—Property recovered or preserved—Charging order for solicitors' costs - 105
See Probate **2.**

IRISH FREE STATE—Bank of Ireland as executor—English assets - 184
See Probate **1.**

JURISDICTION—Damage to grain elevator barge—Action in rem - - 224
See Shipping **10.**

—— Service of writ on English agents of foreign corporation - - 56
See Shipping **12.**

LIMITATION OF TIME—Application for discharge of order for maintenance 1
See Divorce **5.**

LONDON LIGHTERAGE CLAUSE - 183
See Shipping **9.**

MAINTENANCE—"Conduct of the parties"—Conduct not pleaded in answer to petition—Evidence on inquiry as to permanent maintenance — Estoppel - - - - 76
See Divorce **6.**

—— Limitation of time for application for discharge of order for - - 1
See Divorce **5.**

—— Principles of awards of—Alimony in judicial separation distinguished 95
See Divorce **3.**

MEMORIAL—White marble in churchyard—Faculty - - - - 150
See Ecclesiastical Law.

MORTGAGE—Fishing vessels and their "appurtenances"—Drift nets 109
See Shipping **11.**

NEGLIGENCE—Cause of accident left in doubt—Burden of proof - 154
See Shipping **9.**

NETS—Mortgage of fishing vessel and "appurtenances" - - 109
See Shipping **11.**

NOTICE OF ASSIGNMENT—Sufficiency of notice—Freight - - - 87
See Shipping **1.**

NULLITY—Dispensing power as regards inspection of the person - 190
See Divorce **4.**

PERMANENT MAINTENANCE.
See MAINTENANCE.

PORTLAND HARBOUR—Vessels "about to enter"—Order in Council as to Dockyard Port - - - 68
See SHIPPING **6.**

PRACTICE—Divorce - **39, 190, 199, 218**
See DIVORCE **4, 7, 8, 9.**

—— Probate - - - - - **184**
See PROBATE **1, 2.**

—— Shipping - - - - - - **56**
See SHIPPING **12.**

PRELIMINARY ACTS—Statements in, as evidence - - - - **275**
See SHIPPING **5.**

PRIORITIES—Assignment of freight—Sufficiency of notice - - - **87**
See SHIPPING **1.**

PRIZE COURT — *International Law — Damages—Outbreak of War—Enemy Ship—Capture while under Safe Conduct—Hungarian Company — Status of Fiume — "Nationals of the former Kingdom of Hungary"—Effect of Peace Treaty—Treaty of Trianon.*
THE BATHORI - **Lord Merrivale, Pres. 22**

PROBATE—*Practice—Testator domiciled in Ireland—English Assets—Appointment of Bank of Ireland as Executor—Power of English Court to make Grant of Probate to Trust Corporation constituted under the Law of the United Kingdom or of any part thereof —Union with Ireland Act,* 1800 (39 *&* 40 *Geo.* 3, *c.* 67)—*Public Trustee Act,* 1906 (6 *Edw.* 7, *c.* 55), *s.* 6 (1)—*Public Trustee* (*Custodian Trustee*) *Rules,* 1926, *r.* 30—*Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 161.
H. T. BARLOW (*Deceased*)
Lord Merrivale, Pres. 184

2. —— *Probate Action — Intestacy — Interest of Next of Kin—Costs—Solicitor—Property Recovered or Preserved—Charging Order—Solicitors Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 69.
HYDE *v.* WHITE. WHITE *v.* HYDE
Lord Merrivale, Pres. 105

REPAIRERS—Custom of Port of Grimsby
See SHIPPING **8.** **286**

REPAIRS—Not yet executed—Interest on damages - - - - **136**
See SHIPPING **4.**

RESETTLEMENT—Preservation of power of —Innocent spouse—Interests of children - - - - **143**
See DIVORCE **11.**

RULES AND ORDERS :—

—— *Matrimonial Causes Rules,* 1924, *r.* 69 : MOULD *v.* MOULD - - - **76**

—— *Order in Council as to Dockyard Port of Portland* (1931, *No.* 176), *Sch. II.*, *r.* 5 : H. M. SUBMARINE RAINBOW **68**

—— *Public Trustee* (*Custodian Trustee*) *Rules,* 1926, *r.* 30 : H. T. BARLOW (*Deceased*) - - - - **184**

—— *Regulations for Preventing Collisions at Sea,* 1910, *arts.* 18, 19 : THE KAITUNA - - - - **234**

—— —— *art.* 21 *and Note* : THE LADY BELLE - - - - **275**

—— *R. S. C., Order* XXVIII., *r.* 11 : THE NAPIER STAR - - - - **136**

—— —— *Order* XLV., *r.* 1 ; *Order* LXV., *r.* 14 : MASON *v.* MASON AND COTTRELL **199**

SAFE CONDUCT—Hungarian vessel sunk while under—Effect of Peace Treaty on claim for damages - - **22**
See PRIZE COURT.

SET-OFF—Intervener's costs against wife's costs - - - - - **199**
See DIVORCE **9.**

SETTLEMENT—Power to alter order for variation of - - - - **117**
See DIVORCE **10.**

—— Variation of—Interests of children—Preservation of power of resettlement by innocent spouse - **143**
See DIVORCE **11.**

SHIPPING—*Assignment of Freight—Ship's Agents—Notice of Assignment—Sufficiency of Notice—Priorities.*
THE ZIGURDS - - - - **C. A. 87**

2. —— *Bill of Lading—Damage to Cargo —Conflict of Laws—Hague Rules—Belgian Code de Commerce, art.* 91—*Norwegian Ship —Guatemalan Consignees—Antwerp Shipment.*
THE ST. JOSEPH - - **Bateson J. 119**

3. —— *Collision — Damage to Chilean Vessel—Action in rem—Bail—Admission of Liability—Consent to Reference—Vessel repaired in Chile—Items of Claim in various Currencies—Payment in Chile in Chilean Currency — Fall in Exchange Values — Validity of Payment.*
THE BAARN - - - - **C. A. 251**

4. —— —— *Damages—Interest on Sums allowed for estimated Repairs and Demurrage —R. S. C., Order* XXVIII., *r.* 11.
THE NAPIER STAR - **Langton J. 136**

SHIPPING—*continued.*

5. ——— ——— *Keeping Course and Speed—Duty of Stand-on Vessel to take Action—Warning Blasts to arouse Attention—Statements in Preliminary Acts as Evidence—Regulations for Preventing Collisions at Sea,* 1910, *art.* 21 *and Note.*
THE LADY BELLE - **Langton J. 275**

6. ——— ——— *Portland Harbour — Vessels "about to enter" from Seaward—Order in Council as to the Dockyard Port of Portland, Sch. II., r.* 5 (1931, *No.* 176).
H. M. SUBMARINE RAINBOW **Langton J. 68**

7. ——— ——— *Vessels "nearly end on"—Alterations in Heading due to Yawing—Crossing Rule—Regulations for Preventing Collisions at Sea,* 1910, *arts.* 18, 19.
THE KAITUNA - - - **C. A. 234**

8. ——— *Damage in Dock—Ship Repairers—Railway Company's Dock—Custom of Port of Grimsby—Trawler floating on Bulkheads—Owners' Duty to watch during Repairs.*
THE REHEARO - - **Langton J. 286**

9. ——— *Damage to Cargo—Tug towing Barges—Collision with Bridge—Prima facie Negligence—Cause of Accident left in doubt—Burden of Proof—Action framed in Tort—Contract for Transport of Cargo—Exception of Negligence—Agency—Sub-Contractors—Negligence of independent Contractor—Limited Authorization for Exemption of Negligence—London Lighterage Clause.*
THE KITE - - - **Langton J. 154**

10. ——— *Damage to Grain Elevator Barge—Steamship's defective Derrick—Jurisdiction in rem—Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 22, *sub-s.* 1 (*a*), (*iii.*), (*iv.*).
THE MINERVA - - - **Bateson J. 224**

11. ——— *Mortgage—Fishing Vessels and their "Appurtenances"—Drift Nets and Gear—Appropriation.*
THE HUMOROUS. THE MABEL VERA **Bateson J. 109**

12. ——— *Practice — Defendants a foreign Corporation—Service of Writ on English Agents—Tests of carrying on Business within Jurisdiction—Writ and Service set aside.*
THE LALANDIA - - - **Langton J. 56**

SOLICITORS—Charging order for costs—Probate action — Intestacy — Property recovered - - - 105
See PROBATE **2.**

"STAND-ON" VESSEL—Duty to take action - - - - - 275
See SHIPPING **5.**

STATUTES :—

1800.

39 & 40 Geo. 3, c. 67 (Union with Ireland) : H. T. BARLOW (*Deceased*) - **184**

1848.

11 & 12 Vict. c. 43 (Summary Jurisdiction), ss. 1, 11 : NATBORNY *v.* NATBORNY **1**

——— ——— s. 11 : DONKIN *v.* DONKIN - **17**

1857.

20 & 21 Vict. c. 85 (Matrimonial Causes), s. 32 : HORNIMAN *v.* HORNIMAN - **95**

1866.

29 & 30 Vict. c. 32 (Matrimonial Causes), s. 1 : HORNIMAN *v.* HORNIMAN - **95**

1895.

58 & 59 Vict. c. 39 (Summary Jurisdiction (Separation and Maintenance)), ss. 4, 8 : DONKIN *v.* DONKIN - **17**

——— ——— ss. 7, 8 : NATBORNY *v.* NATBORNY - - - - - - **1**

1906.

6 Edw. 7, c. 55 (Public Trustee), s. 6, sub-s. 1 : H. T. BARLOW (*Deceased*) **184**

1925.

15 & 16 Geo. 5, c. 49 (Judicature (Consolidation)), s. 22, sub-s. 1 (*a*) (iii.), (iv.) : THE MINERVA - - **224**

——— ——— s. 161 : H. T. BARLOW (*Deceased*) - - - - - - **184**

——— ——— s. 178 : CULLEN *v.* CULLEN - **218**

——— ——— s. 190, sub-s. 1 : MOULD *v.* MOULD - - - - - - **76**

——— ——— s. 190, sub-ss. 1, 2 : HORNIMAN *v.* HORNIMAN - - - - - **95**

——— ——— s. 192 : COLCLOUGH *v.* COLCLOUGH AND FISHER - - **143**

15 & 16 Geo. 5, c. 51 (Summary Jurisdiction (Separation and Maintenance)) : DONKIN *v.* DONKIN - **17**

1932.

22 & 23 Geo. 5, c. 37 (Solicitors), s. 69 : HYDE *v.* WHITE. WHITE *v.* HYDE **105**

MASON *v.* MASON AND COTTRELL **199**

SUB-CONTRACTORS — Limited authorization for exemption of negligence **154**
See SHIPPING **9.**

TIME—Limitation of, for application for discharge of order for maintenance - - - - - - - **1**
See DIVORCE **5.**

TORT—Action framed in—Contract for transportation of cargo - - 154
See SHIPPING 9.

TRIANON, TREATY OF—Effect of, on citizens of Fiume - - - 22
See PRIZE COURT.

VARIATION OF SETTLEMENT.
See SETTLEMENT.

WARNING BLASTS—To arouse attention 275
See SHIPPING 5.

WILL—Irish Free State domicil—United Kingdom assets—Bank of Ireland as executor - - - - 184
See PROBATE 1.

WRIT—Service of, on English agents of foreign corporation - - - 56
See SHIPPING 12.

YAWING—Alteration in heading due to—"End on" rule - - - 234
See SHIPPING 7.

BIBL.
LONDIN.
UNIV.

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

THE

LAW REPORTS.

Under the Superintendence and Control of the

INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

KING'S BENCH DIVISION.

(Including Divorce, Admiralty, Ecclesiastical, and Railway and Canal Commission Cases.)

1933.—VOL. II. K.B.D.

2 K.B. (p. 141 to p. 272).

PART VIII.—AUGUST 2.

TABLE OF CASES.

KING'S BENCH DIVISION.

PAGE
CAMMELL LAIRD & CO. *v.* MANGANESE BRONZE AND BRASS CO. .. C. A. 141
KARFLEX, LD. *v.* POOLE 251
LAVELL & CO. *v.* A. AND E. O'LEARY .. .. C. A. 200
REIDY *v.* WALKER 266
SAUNDERS-JACOBS *v.* YATES .. .. C. A. 240
VANBERGEN *v.* ST. EDMUNDS PROPERTIES, LD. .. .. .. C. A. 223

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.
[*For Names of Editors and Reporters see Inside.*]

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET,
LONDON, W.C. 1,
AND
PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

"THE LAW REPORTS, 1933," for August, consist of—

Chancery Division	Part VIII.
King's Bench Division	Part VIII.
Appeal Cases	Part IV.
Complete Current Digest	Part II.

EDITOR—RT. HON. SIR FREDERICK POLLOCK, BART., K.C.

ASSISTANT EDITOR OF CURRENT DIGEST—J. S. HENDERSON, *Barrister-at-Law.*

ASSISTANT EDITORS OF WEEKLY NOTES { W. IVIMEY COOK, R. F. STUBBING, } *Barristers-at-Law.*

REPORTERS :

House of Lords	W. H. GRIFFITH,	*Barrister-at-Law.*
Privy Council	A. M. TALBOT,	*Barrister-at-Law.*
Court of Appeal, No. 1 ..	W. IVIMEY COOK, H. C. GARSIA,	*Barristers-at-Law.*
Court of Appeal, No. 2 ..	J. S. HENDERSON, R. F. STUBBING,	*Barristers-at-Law.*
Mr. Justice Eve	H. LANGFORD LEWIS,	*Barristers-at-Law.*
Mr. Justice Maugham .. AND	K. R. A. HART,	
Mr. Justice Bennett ..	J. L. DENISON,	
Mr. Justice Clauson ..	H. C. HAWKINS,	*Barristers-at-Law.*
Mr. Justice Luxmoore .. AND	A. R. TAYLOUR,	
Mr. Justice Farwell ..	P. J. BOLAND,	
	E. K. CORRIE,	*Barrister-at-Law.*
King's Bench **Court of Criminal Appeal, Appeals from County Courts and Railway and Canal Commission Cases**	J. RITCHIE, W. L. L. BELL, F. PORTER FAUSSET, G. F. L. BRIDGMAN T. W. MORGAN J. W. HALL,	*Barristers-at-Law.*
Probate and Divorce ..	R. M. MIDDLETON,	*Barrister-at-Law.*
Admiralty Cases	E. C. M. TREHERN,	*Barrister-at-Law.*
Ecclesiastical Cases ..	W. L. L. BELL,	*Barrister-at-Law.*

THREE IMPORTANT LEGAL PUBLICATIONS

Ready about August 1st

KONSTAM & ROWE'S RAILWAY RATING LAW AND PROCEDURE

By His Honour JUDGE KONSTAM, K.C., and M. E. ROWE, Barrister-at-Law. The authors deal with many problems arising under the new Act, the Scheme, Schedules, Valuation Roll Rules, etc. As an expert elucidation of a new and difficult regime this work will be invaluable.

Price 25s. Postage 9d.

Published last week

WITHERS ON REVERSIONS

The Second Edition, 1933, has been enlarged to about two-and-a-half-times the size of the original work by the Author, A. H. WITHERS, Barrister-at-Law, assisted by W. S. WIGGLESWORTH, Barrister-at-Law. It is a complete guide to the Investigation of Title to and the completion of Purchases and Mortgages of Life and Reversionary Interests in Personalty Trust Funds and Policies of Life Assurance.

Price 45s. Postage 9d.

Published a few days ago

BUTTERWORTH'S WORKMEN'S COMPENSATION CASES

This volume covers the year 1932 and is edited by His Honour JUDGE RUEGG, K.C., E. DALE and J. ALUN PUGH, Barristers-at-Law. No Solicitor concerned with Workmen's Compensation can afford to be without this latest volume.

Price 27s. 6d. Postage 9d.

BUTTERWORTH & CO. (Publishers), LTD.,
Bell Yard, Temple Bar, LONDON, W.C. 2.

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

THE LAW REPORTS, 1933 (Unbound).

(Thick or Thin-paper Editions.)

	£	s.	d.
ENTIRE SERIES (with which are presented the Statutes, Weekly Notes, and Complete Current Digest)	6	16	0

No issues of the publications will be delivered until the subscription has been paid.

All sums payable to the Council must be prepaid.

Cheques and Money Orders should be remitted direct to the Secretary and should be made payable to the "Council of Law Reporting" and crossed " & Co., not negotiable." *Banker's Commission must be added to the amount of the Subscription in case of every remittance from Ireland, Scotland, the Isle of Man, and the Channel Islands. Remittances from abroad must be made payable in London.*

COMMUNICATIONS should be addressed to

THE SECRETARY, COUNCIL OF LAW REPORTING,
30, Montague Street, London, W.C. 1,

and not to any individual by name, *except* those in reference to *Reports of Cases,* which should be addressed to the Editor,

The Rt. Hon. Sir Frederick Pollock, Bart., K.C.,
13, Old Square, Lincoln's Inn, W.C. 2.

PRICES OF OTHER PUBLICATIONS OF THE COUNCIL.

		£	s.	d.
COMPLETE CURRENT DIGEST, 1933 (a Digest, issued quarterly, of all reported cases) (unbound)		1	1	0
CONSOLIDATED DIGEST, 1865–1890 (a Digest of cases reported in the Law Reports) (in cloth)		4	4	0
DECENNIAL DIGEST, 1891–1900 (ditto)	(in cloth)	2	2	0
DECENNIAL DIGEST, 1901–1910 (ditto)	(in cloth)	2	2	0
DECENNIAL DIGEST, 1911–1920 (a Digest of all reported cases)	(in cloth)	4	4	0
DECENNIAL DIGEST, 1921–1930 (ditto)	(in cloth)	4	4	0
WEEKLY NOTES, 1933 (unbound)		1	10	0
INDIAN APPEALS, 1933 (unbound)		1	1	0
INDIAN APPEALS DIGEST, 1872–1923 (in cloth)		2	2	0

The back years of the *Law Reports,* since 1890, and of the *Indian Appeals,* since 1921, may be obtained on application to the Secretary. The *Weekly Notes,* 1891–1921, and the *Law Reports,* 1918–1920, are out of print. The Council have a limited number of unbound copies of the *Law Reports,* 1891–1916, which they are prepared to sell at reduced prices. A further reduction would be made to purchasers who require the *Law Reports* for five or more consecutive years between 1890 and 1917.

PRESENT PRICES FOR OFFICE PATTERN BINDINGS.

The Council are the only official binders of their publications, and they employ no agents in their binding business. The Secretary will be pleased to give estimates for bindings in special styles desired by subscribers.

LAW REPORTS.

	Ordinary Edition.		Thin Edition.		
	s.	d.	s.	d.	
Cloth	5	3	6	9	per Vol.
Buckram	6	9	8	6	"
Half-Calf	8	0	9	9	"
Half-Morocco	9	9	11	3	"
Calf	11	6	13	3	"
Full Morocco (Limp)	—		17	6	"

WEEKLY NOTES.

	Notes of Cases.		Notes of Cases and Miscellaneous.	
	s.	d.	s.	d.
Cloth	5	9	6	0
Buckram	8	0	8	6
Half-Calf	10	0	10	6
Half-Morocco	10	9	11	0
Calf	14	0	15	0

The *Law Reports* and *Statutes* for 1932 consist of 7 Volumes. In the thin-paper edition these may be bound as 4 Volumes.

When the Subscriber's address is not more than two miles from the Law Courts no charge will be made for the cost of carriage of bound volumes for the year, beyond that distance but within the London Area **1s. 9d.**, outside that area but within the United Kingdom (including Northern Ireland) **3s.** (Thin Edition **1s. 9d.**), and in the Colonies or abroad the full cost will be charged.

Unbound parts should be sent, carriage paid, to 30, Montague Street, London, W.C. 1, as soon as the volumes are complete. Any undue delay in this respect may necessitate an extra charge being made.